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## CONTENTS

Journal  
Reports

PAGES.

1—10

1—100

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# THE SUPREME COURT JOURNAL (JOURNAL)

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117

JULY

[1966]

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## THE RETIRING AND INCOMING CHIEF JUSTICES OF INDIA.

Of all the Chief Justices of India who have served so far Amal Kumar Sarkar, C.J., holds the record for the briefest tenure of office. It has been barely about three and a half months. Called to the Bar in 1931 he became a Judge of the Calcutta High Court in 1949 and a Judge of the Supreme Court in 1957. During all these years he had won for himself a name for unfailing courtesy, receptivity to arguments and great patience. He pulled his weight with his colleagues and would not hesitate to differ if necessary. His dissenting judgment in the *Reference under Article 143 of the Constitution*<sup>1</sup>, serves to illustrate this. The Chief Justice's retirement will leave a void difficult to fill.

His successor in office, Justice K. Subba Rao, is in his own way an arresting personality. An Indian lawyer can look forward to no higher distinction than being invited to serve as the Chief Justice of India. That great distinction has now come to Justice Subba Rao. He was in the front ranks of the Madras Bar when he became a Judge of the Madras High Court in 1948 at a comparatively early age. By training, temperament and association he was equal to handling and arguing a large number of cases. With the formation of the Andhra High Court in 1954 he became the Chief Justice of that Court. On the integration of the Andhra and Telengana areas and the Constitution of the State of Andhra Pradesh he took over the administration of the Judiciary as its first Chief Justice. Some of the urgent and important problems he had to tackle were the problem of fusion and merger of the Andhra and Telengana sections of the Bench and the Bar with their different historical background and traditions and the problem of accumulation of arrears in the High Court. He succeeded remarkably well in both tasks and inspired confidence by his merit, learning and experience, as well as by his administrative efficiency in organising the Andhra Pradesh High Court with genuine understanding and practical wisdom to function within a short time on sound lines and without any hitch. When, therefore, at the end of January, 1958 he was appointed Judge of the Supreme Court it gave satisfaction all round.

Though the quality of his judicial work and the contribution he has made could be assessed only after his retirement, this much may be said without offending proprieties. Justice Subba Rao has served the cause of justice untrammelled by any predilections, without any preconceived or *a priori* theory of justice, following always the light of his own mind. He has held the scales of justice even between the State and the subject, between party and party and brought to bear an objective outlook uninfluenced by extraneous considerations in dispensing justice. In the Supreme

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1. (1965) 1 S.C.J. 847.



Court he has never hesitated to express his own view points even if they were opposed to those of his colleagues. His dissenting judgments are many and imposing. His expositions have been lucid and logical free from embellishments and sentimentalism. He has delivered a number of important judgments on constitutional and other questions. To him 'a fundamental right is transcendental in nature and it controls both the legislative and executive acts' (*Thomas Dana's case*<sup>2</sup>, and "fundamental rights cannot be made to depend solely upon the presumed fairness and integrity of officers of State" (*Kishen Chand Arora's case*<sup>3</sup>, *Gherulal Parak's case*<sup>4</sup>), dealing with wagering contracts *M & M Sarma's case*<sup>5</sup>, dealing with Parliamentary Privileges and Freedom of the Press *Nanavati's Case*<sup>6</sup> on procedure when the Sessions Judge disagrees with the jury verdict etc. *Lachman's case*<sup>7</sup> dealing with desertion by a spouse and *Varadarajan's case*<sup>8</sup>, on kidnapping are some of his noteworthy decisions.

Justice Subba Rao's tenure of office as Chief Justice will be about a year and a half. Though it is relatively only a short period we are sure that the impact of his personality will be felt in the sphere of administration of justice within that time. We offer him our respectful and cordial felicitations.




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2 (1959) M.L.J. (Crl.) 474 (1959) S.C.J. 699 at p. 715  
 3 (1961) 2 S.C.J. 309 at p. 322 (1961) M.L.J. (Crl.) 541  
 4 (1959) S.C.J. 878 (1959) 2 M.L.J. (S.C.) 81 (1959) 2 An.W.R. (S.C.) 81  
 5 (1959) S.C.J. 925 (1959) M.L.J. (Crl.) 660 (1959) 2 M.L.J. (S.C.) 125 (1953) 2 An.W.R. (S.C.) 125  
 6 (1962) 2 S.C.J. 347; (1962) M.L.J. (Crl.) 531  
 7 A.I.R. 1964 S.C. 40  
 8 (1945) 2 S.C.J. 493 (1965) 2 M.L.J. (S.C.) 40 (1965) 2 An.W.R. (S.C.) 40 (1965) M.L.J. (Crl.) 640

## INDIAN PRESIDENCY.\*

By

DR. VISHNU NARAIN SRIVASTAVA, M. A., PH. D.

*Prof. & Head of the Deptt. of Political Science, D. A. V. College, Kanpur.*

The Indian Presidency has been a subject of interesting comment ever since the institution of the office by the Constituent Assembly of India and particularly since the commencement of the Indian Constitution on 26th January, 1950. The President possesses large powers under the Constitution, which fact creates the impression that he is by no means only the formal executive of the Union but that he can, if he so chooses, become a real ruler under the framework of the Constitution. There is the opposite view, popularly held in the country, that the President is a mere 'figure head' and that "he could not act and will not act except on the advice of his Ministers" and "that<sup>1</sup> he occupies the same position as the King under the English Constitution."<sup>2</sup>

These views regarding the status, powers and functions of the President of India are confusing. A careful study of the Constitution will prove that the President is intended neither to be a powerful ruler nor a figure head nor an exact replica of the British Crown but he is to be a constitutional head of the state and the symbol of the nation, vested with considerable authority and status under the express provisions of the Constitution, sufficient to make him a brake in the governmental machinery and at times its engine—a position which is essential to the proper functioning of our quasi-federal Parliamentary democracy.

*President as the Chief of the Nation and the symbol of its Unity.*—The importance of the President in the constitutional set up of the country is disclosed by the manner of his election<sup>3</sup>. He is elected by the members of an Electoral College consisting of (a) the elected members of both Houses of Parliament and (b) the elected members of the Legislative Assemblies of the States. Both Prime Minister Nehru and Ambedkar stated in the Constituent Assembly,<sup>4</sup> that election by such Electoral Colleges was tantamount to a direct election on the basis of a adult franchise. The suggestion that the Electoral College should consist of members of Parliament alone was turned down so that "the President might not be a creature of the majority in power and a pale replica of the Prime Minister and therefore no better than a figure-head as in France under the Constitution of 1875, or Ireland."<sup>5</sup> This would show, in the first place, that the President is not merely a figurehead and in the second place, that he represents the People of India, as against the Union Ministers who represent only the majority party in Parliament, thus making him not only the head of the Union, but also the Chief of the Nation and the concrete embodiment of the unity of the State.

The President takes the oath<sup>6</sup>, to "faithfully execute the office of the President . . . . of India and . . . . to . . . . preserve, protect and defend the Constitution and

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\* Summary of thesis on which the degree of Ph. D. was awarded by the Agra University in the Convocation held on 4th December, 1965.

1. Ambedkar, C.A.D., Vol. VIII, p. 215.
2. C.A.D. Vol. VII, p. 32.
3. Article 54.
4. C.A.D. Vol. VII, p. 998 and Vol. IV, p. 846.
5. C.A.D. Vol. IV, pp. 734-35.
6. Article 60.

the law — " In the result, he has to maintain the Constitution against inroads from whatever quarters they might come. Further, he takes an oath to devote himself " to the service and well being of the People of India " Thus, he represents the will of the people in securing the unity, welfare and integrity of the country. No such oath is taken either by the Vice-President, the Prime Minister or any other Minister of the Union. The oath taken by them is only to act within the Constitution, which can function only if preserved, protected and defended by the President. Thus, the obligations and responsibilities to which the President is pledged are different from and superior to those of the Vice President, the Prime Minister or any Minister of the Union.<sup>7</sup>

*Ministerial responsibility*—The Constitution vests in the President a large array of powers and functions. The impressive list of the Presidential powers bears a close resemblance to the formal powers of the British Monarch. He is to exercise these powers and functions with the aid and advice of his Council of Ministers. The British Sovereign is bound by the advice of his Ministers as is implied by the well-known doctrine that " the King can do no wrong ". The Crown must act on the advice of the Cabinet and must not act on any other advice.<sup>8</sup> This convention is enforced through the rule that every public act of the Crown must bear the counter-signature of some Minister responsible to Parliament. This rule is so universal in its operation that it has been said that " there is not a moment in the King's life, from accession to his demise, during which there is not some one responsible to Parliament for his public conduct ".<sup>9</sup> There is no such explicit provision in the Indian Constitution to bind the President to act in accordance with the advice of his Council of Ministers. Instead of providing that the President shall act only on the counter signature of a Minister responsible to Parliament, Article 77 (2) of our Constitution provides that the President himself shall make rules as to the manner in which his orders and instruments shall be authenticated and this is done at present by a departmental Secretary and not by a Minister.

So, whereas in England the Ministers assume legal responsibility for the acts of the Crown, in India the Ministers have no legal responsibility for the acts of the President. The proposal to incorporate instructions<sup>10</sup>, that the President would be bound by the advice of the Ministers was deleted by the Constituent Assembly. The provision in the Irish Constitution<sup>11</sup> that the President should accept the advice of the Ministers was also not incorporated in our Constitution. The President is, therefore, under no legal obligation to accept in every case with which he deals the aid and advice of his Council of Ministers. B. N. Rau rightly observes that " even if in any particular instance the President acts otherwise than on ministerial advice, the validity of the act cannot be questioned in a Court on that ground ".<sup>12</sup>

Though there is no legal obligation upon the President to act upon the advice of his Ministers, the exigencies of responsible government demand that he should normally act on ministerial advice. In England, the dependence of the Crown for taxes and supplies on the elected representatives of the people in the House of Commons obliges the Sovereign to rely on a ministry having the confidence of the House and the evolution of the doctrine that the Sovereign was bound to accept the advice of his ministry became inevitable. Its logical corollary was responsibility, of the ministry and not of the Crown for the government of the country. The same basic postulate forms an integral part of the Indian Constitution. Under Article 113

7. Mushu, K. M. *The President under the Indian Const.* (1963) p. 35-36.

8. Halsbury's *Laws of England* Vol. VI pp. 636-7.

9. Todd *Parliamentary Government in England* 2nd Ed. Vol. I p. 266.

10. Mushu, K. M. *The President under the Indian Const.* (1963) p. 47.

11. Article 13 (a) (ii) of the Constitution of Eire 1937.

12. Rau, B. N. *India's Constitution in the making* (1960) p. 375.

of the Constitution, all estimates of expenditure other than those relating to expenditure charged upon the Consolidated Fund of India are required to be submitted in the form of demands for grants to the House of the People which may "assent or refuse to assent to any demand for grant or assent to such demand subject to any reduction of the amount thereof." Since the House of the People has thus the last word in financial matters and since that House is controlled by the Council of Ministers, the result will be that when a strong-headed President disregards the aid and advice of the Council of Ministers, the Council of Ministers through the House of the People, will refuse to assent to any demand for grant and will in this way be able to curb the powers of the President. Thus we see that for the smooth and efficient running of the administration, the President must act according to the advice of his Council of Ministers. Since in this way the control over the public Exchequer is vested for all practical purposes in the Council of Ministers, the position virtually is that the real executive power of the Union is vested in the Council of Ministers and the President is normally only the constitutional head of the State and cannot for any long period of time run the machinery of government in disregard of the advice tendered by his Council of Ministers.

We thus find that there are provisions in the Constitution the practical effect of which is that the President will normally be bound to act according to the aid and advice of his Council of Ministers. Indeed, no Sovereign or Governor-General in a British Dominion would dare reject the advice of his ministry save at his own peril. The abdication of Edward VIII, and the removal of the Governor-General of the Irish Free State on the advice of De Valera when he first came into power are recent illustrations. The President of India is also liable for removal by the process of impeachment.

But, by no means does it follow that the President is merely a rubber stamp, a marionette in the hands of his Council of Ministers or dignified hieroglyphic—to use Coke's immortal phrase. The Constitution secures to the President the same powers as Bagehot<sup>13</sup> ascribed to the Crown in England—"the right to be consulted, the right to encourage, the right to warn." He has a very useful function to perform behind the scene. As provided in Article 78, all decisions of the Council of Ministers are communicated to him and he can call for any information. He is thus fully posted with the affairs of the Government. The method of election of the President set out in Article 54 ensures that the President is an elderly statesman enjoying the confidence of the elected elements of the various Legislatures. He can bring his experience and wisdom to influence the Council of Ministers in formulating their decisions. He is regarded as a non-party man with ability to approach all problems in an impartial and dispassionate manner and he can make his views felt by placing them before the Council of Ministers. Either he can convince the Council of Ministers or be convinced by them. If, however, his views do not ultimately prevail with the Council of Ministers, he must yield to their decisions. There is no express provision in the Constitution to this effect; but this is law inherent in the mechanism of responsible Government and in the method of its working in whatever soil that system of government is implanted.

*Presidential Authority.*—Obviously, then, persuasion, not compulsion, is the normal instrument of Presidential authority. But, where the normal course of responsible Government ceases to run smoothly and acceptance of ministerial advice tends to create a breakdown of the constitutional machinery, the President's personal intervention becomes imperative. Situations may arise, where no single party commands a majority in the Legislature to be able to undertake the responsibility of forming a Government as happened in England in 1931 under the Labour Government and Ramsay MacDonald was commissioned by the Sovereign to form a National Government of all parties, or, having formed a Government, its stability may be threatened by unforeseen events; or, a Government in power might embark on action in persistent violation of the law or deliberate defiance of the Constitution

13. Bagehot, *English Constitution* (World Classics Ed. 1928) p. 67.

as the Premier of New South Wales, Lang, did in 1932, or again a Government is corrupt and this charge is proved as happened in the case of John Macdonald's Government in Canada in 1873 and its continuance might become obnoxious to the nation and its policies might become ruinous to the country. It is, indeed, impossible to predict every exigency that may render it impossible for the President to accept ministerial advice. In all such circumstances, the President of India, like the British Crown or Dominion Governor-General, may be presumed to have a clear right to depart from ministerial advice and act on his own discretion.

There are certain other exceptional matters in which the advice of the Council of Ministers is not required or is not reliable or is not sufficient or is not available. Among these exceptional matters are the following

- (1) The appointment and dismissal of a Prime Minister who ceases to enjoy the leadership of his party
- (2) Dismissal of a ministry which has lost the confidence of Parliament
- (3) Dismissal of a House of the People, which appears to the President to have lost the confidence of the Public
- (4) The exercise of the powers as a Supreme Commander in an emergency where the ministry has failed to defend the country
- (5) When there is no ministry due to a possible wholesale assassination.
- (6) Consultation with the Supreme Court of India under Article 143 when there is a cleavage of opinion between him and the Council of Ministers on any question of law or fact

The President may also disregard the advice of his Council of Ministers in such matters as the protection of the interest of minorities<sup>14</sup> and backward classes<sup>15</sup>, the exercise of his emergency<sup>16</sup> powers to suspend the Constitution in a State where another party is in power, the appointment of a Finance Commission<sup>17</sup>, an Election Commission<sup>18</sup> for the superintendence, direction and control of elections, the Attorney General<sup>19</sup> of India in order to receive independent advice in constitutional matters, the Comptroller and Auditor-General of India<sup>20</sup>, members of the Union Public Service Commission<sup>21</sup>, Judges of Supreme Court<sup>22</sup> and High Courts<sup>23</sup>, etc. These are matters in the decision of which any party bias has to be avoided. The President may also disregard ministerial advice where he is enjoined to act otherwise under the Constitution<sup>24</sup>.

The Ministers hold office during the pleasure of the President<sup>25</sup>. It would be ridiculous to suggest that a Minister could be dismissed only on his own advice. If, on the dismissal of the ministry, the President is able to find a suitable ministry in the existing Legislature, he has the right to summon those who, he feels, can command a majority to form a new Government. If the alignment of the parties does not permit him to adopt such a course, he has the undoubted right to dissolve the Legislature and order fresh elections. Of course, if the country should return the old

14 Articles 330, 331, 347 etc

15 Articles 341, 342

16 Article 356

17 Article 280

18 Article 324

19 Article 76.

20 Article 148

21 Article 315

22 Article 124

23 Article 217

24 Articles 3 53 85 103, 111

25 Article 75 (2)

ministerial party to power, the President's action would stand condemned by the nation and he would have either to resign or to eat the humble pie at the hands of the ministry. Such an event has been rare of occurrence. The power of dismissal or of dissolution is, of course, double-edged. But the wisdom and restraint inherent in its exercise has generally obtained the verdict of approval from the people in the rare cases when it has been exercised.

The President in the Constitution is, therefore, not a figurehead. He is the embodiment of the ultimate authority of the Constitution, which moves only on threat to constitutional Government. The President's oath of office compels him "to preserve, protect and defend the Constitution and the law" and "to devote himself to the service and well-being of the people of India". The supremacy of the President lies in securing the supremacy of the Constitution.

It is possible to contend that the exercise of Presidential authority without ministerial advice is fraught with dangerous consequences for it may lead to abuse of authority resulting in the upsetting of the traditional maxims and principles of parliamentary Government. In order to check this possibility it is suggested that whenever the President desires to depart from ministerial advice and act on his own, he should be guided by the decisions of a kind of Privy Council, consisting of non-party elder statesmen, a body analogous to the Council of State under Article 31 of the Irish Constitution of 1937.

The powers of the President are almost nil when there is a stable majority in the House of the People to support the Council of Ministers headed by a Prime Minister who rules the country but they will increase in proportion to the instability and weakness of the Council. They will reach a maximum when there is no party in a majority in the House of the People and the Union Government has to be carried on with shifting coalition ministries. It is likely that there will be a struggle for power between the President and Prime Minister and the result will depend upon the relative personalities of the two incumbents and party alignments in the two Houses of Parliament. An anomalous situation can come into being when a powerful Prime Minister faces a popular and strong-headed President and the situation will be still worse if the Prime Minister and the majority in the House of the People belong to one party and the President and the majority in the Council of States belong to another.

**Status.**—It is the Presidential authority that keeps the Union and the people bound together constitutionally. His authority runs like a golden thread throughout the Constitution of the Union.<sup>1</sup> The people look to him for the protection of their fundamental rights ; the Judiciary for its independence ; and Parliament for the due fulfilment of its constitutional functions. The country as a whole depends on him for protection in an emergency.

The States look to him for safeguarding their autonomy. The importance of Presidential authority will be felt when conflicts arise between different constituent States of the Union, possibly having Governments formed by different parties. In this contingency, the ruling political party at the Centre might possibly come into conflict with State Governments formed by other political parties. It is in such a case the President has to be looked up to for a solution, and to function as the arbitrator<sup>2</sup> in all Union-State differences, particularly in the application of Article 356 of the Constitution for superseding a State Legislature.

Though the President does not govern the country, he, like the British Sovereign, personally performs certain definite acts which he and he alone can do and which no other State functionary can perform under the Constitution. Important among these are :

1. Munshi, K. M., *Ibid.*, p. 36.

2. Santhanam, K. Third Lecture in a series of four on "Conventions and Properties in the Parliamentary Government of India" delivered at the Indian Institute of Public Administration New Delhi, reported in the *Hindustan Times*, 3rd October, 1964.

(1) authorising a political leader to form a ministry<sup>3</sup>; (2) summoning each House of Parliament<sup>4</sup>, (3) proroguing the Houses or either House of Parliament<sup>5</sup>, (4) dissolving the House of the People<sup>6</sup> entailing a general election, (5) addressings both Houses of Parliament<sup>7</sup> assembled together at the commencement of the first session after each general election to the House of the People and at the commencement of the first session of each year, (6) summoning the Houses of Parliament to meet in a joint<sup>8</sup> sitting for the purpose of deliberating and voting on the Bill in case of disagreement between them, (7) assenting to a Bill<sup>7</sup> when passed by the Legislature, (8) summoning a conference of leaders to consider ways of handling a constitutional crisis as in England in 1931, (9) receiving ambassadors who present their credentials to him, etc

The whole authority of the State periodically returns into the hands of the President whenever the ministry changes. During the interval between the retirement of one Government and the appointment of another, the President is the repository of all power. Power of a genuine kind must rest with the President so long as it is in his discretion to "send for" the leader of the opposition and so long as he can under favourable circumstances demand or refuse a dissolution.

Denied the authority of the making of laws and the actual management of the public departments, the President can and does patronise with judgment certain branches of national activity, such as, arts, literature, science, industry and the stage and inspire and supervise movements for improving the conditions of the masses for supplying them with better dwellings, hospital care, good nursing and relief in distress. He is at the head of the pageant of national life. Presidential patronage is a great asset to any cause, institution or fund and ensures for its popular support. It imparts a 'national appeal' to any cause which no other person however, eminent could give.

The President is the fountain of honour. The awards like Bharat Ratna, Padma Vibhushan, Padma Bhushan, Padma Shri, etc., are and can be made by him alone though as a matter of practice only on the advice of the Prime Minister. Like the British Crown, he is a link between the Executive and the Legislature and he can utilize his good offices whenever needed to promote harmony and understanding between them.

The President is the symbol of the Nation and supposed to be above party and as such he can act as a mediator between political leaders in times of crisis to maintain national unity. In the international field, he can and does help in strengthening the cultural, social and political ties of India with other countries through his visits and the visits of foreign dignitaries to him. During the time of war, his visits and inspections of the armed forces in the field may serve as a source of immense inspiration and may help them to rally together and inspire courage and fortitude in the face of common danger.

The study would appear to show that the President of India is not the exact replica of the British Monarch. It is true that we have a Parliamentary form of Government as in the U.K. and not a Presidential form of Government as in the U.S.A. But this fact does not justify the assumption that the President can have only the status of a British Monarch, irrespective of the express provisions of the Constitution and such a claim was never made by the Founding Fathers. Nor is such an inference warranted in the light of constitutional experience of different countries.\* The President is expressly enjoined to act in accordance with 'this'

3 Article 75 (1)

4 Article 85

5 Article 87

6 Article 103

7 Articles 111, 201

8. Munshi, K. M. *The President under the Indian Constitution* (1963) Pp 12-30-31

Constitution<sup>9</sup> i.e., within the limitations imposed by it by express provisions. It would, therefore, be unjustifiable to interpret the powers of the President conferred by the Constitution in the light of any other law or constitution or by elevating a practice followed in a given political situation as a binding convention.<sup>8</sup>

For the most part, the Indian President shall be guided by the principles and maxims underlying the Parliamentary form of Government and act generally like the British Sovereign in the discharge of his powers and functions. But we cannot expect him to function like the British Sovereign under all conditions, for "our conditions and problems are not on par with the British and it may not be desirable to treat ourselves as strictly bound by the interpretations which have been given from time to time to expressions in England."<sup>10</sup> The departure is necessitated particularly by two factors peculiar to our country—a federal system and the prospect of a plurality of parties in the States and at the Centre. After considering the problem in its entirety, no serious student of constitutions could possibly hold the view that an elected President of a federal State can occupy exactly the position of the hereditary head of a unitary State like the British Sovereign.

It would seem to be inevitable that, in a federal State, whatever the distribution of powers between the centre and the Constituent States, there should be some provision for an independent and neutral focus of power and decision to adjudicate effectively and conclusively between the rival and possibly controversial claims of the Centre and the constituent States. In the U.S.A. this function is performed by the Supreme Court but that country still has a two party system. Even so, American opinion has consistently felt for the last three quarters of a century that the Supreme Court has functioned more as an ally of the Federal Government than as a guardian of State rights. Both the conscious and the inherent bias of legists and jurists is in favour of the unitary State. They can with effort only reconcile the rival claims of the State with those of the States within the State. But in a country like India with strong regional diversities of economic and social conditions, languages and historical inertia, and basically differing political ideologies, the adjudicating non-partisan umpire standing between the Centre and the States has to function more in a political than a legalistic spirit. The real and the really valid view embodied in the Constitution is this that, the President shall function as such an umpire, whenever the need should arise, in an impartial and non-partisan spirit while normally working as a constitutional head of the State. As pointed out above in this article in suspending the normal constitutional machinery in a State in conditions of a political stalemate or emergency, in 'defending' the Constitution against political inroads upon it from any quarter, in ensuring financial stability and probity in the administration, in safeguarding the rights of less-privileged classes or weaker elements in the population of the Union, the President, rather than the political Government of the day, has to play a special and inevitable role. Even if the Founding Fathers did not openly say so, the facts of the situation oblige us to say that they intended to say so.

To sum up, the President of India is to be an adviser, a brake, an arbiter and not a protagonist. He is the Head of the State but not of the Government. He is the symbol of the Nation and the embodiment of the unity of the State. He is the great centre of national unity, the fulcrum of our political and social activities, theoretically vested with a vast multitude of powers but actually exercising only a few of them and that too, very rarely and invariably in accordance with the Constitution. He is the supreme guardian of the democratic processes and forms and has been vested with powers of safeguarding the Constitution as also those necessary to maintain the machinery of the Government effectively in a crisis. The business of the

9. Article 3 (1).

10. Vide President Rajendra Prasad, speech at the Indian Law Institute New Delhi 28th November, 1960.



President is not to govern, that is the right of the Council of Ministers headed by the Prime Minister. But when they fail, the President, in order to preserve, protect and defend the Constitution, becomes all powerful and functions as an independent organ of the State representing the whole Union and exercising independent powers. Thus, the President is the repository of a "reserve power" to prevent the break down of the Constitution and not a device to help in the establishment of a Presidential despotism veiled or open. He is, neither as powerless as the French President was in the Constitution of 1875 nor a mere titular head as in Ireland. While normally lacking the plenitude of power enjoyed by the American President, the President of India is certainly endowed with vastly greater power than its patently obvious prototype, the British Crown, and it is in this vast, vital and varied potential authority that the real authority, dignity and national importance of the office really lies.

# The Supreme Court Journal (Reports)

II]

JULY

[1966

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, J. C. SHAH AND R. S. BACHAWAT, JJ.

Anowar Hussain

.. Appellant\*

v.

Ajoy Kumar Mukherjee and others

.. Respondents.

*Judicial Officers' Protection Act (XVIII of 1850), section 1—Protection afforded to acts done in judicial capacity only—Charge of false imprisonment made against the officer—No formal complaint lodged—No report made by any police officer in writing—No plea by the officer that the act was done in his judicial capacity—Admission that he had acted under the orders of the superior officer—Act was reckless, malicious, concurrent finding of Courts below—No protection under the Act.*

The appellant has no protection as a judicial officer because he is not shown to have acted in ordering that the respondent be arrested, in the discharge of the duties of his office as a Magistrate but pleaded and admitted that he acted in discharge of his duty under the direction given by his superior officer.

The statute is clearly intended to grant protection to judicial officers against suits in respect of acts done or ordered to be done by them in discharge of their duties as such officers. The statute protects a judicial officer only when he is acting in his judicial capacity and then only the protection is absolute and no enquiry will be entertained whether the act was done or ordered erroneously, irregularly or even illegally, or was done or ordered without believing in good faith that he had jurisdiction.

In the absence of a formal complaint lodged before the officer, charging the respondent with having committed an offence under section 463, Penal Code, or any other offence, power under section 190 (1)(a) of the Criminal Procedure Code could not be exercised. Power under section 190 (1) (b) of the Code could also be not exercised in the absence of a report in writing of the facts stating the offence made by any police officer. The officer did not also act upon the information as a Magistrate to proceed under section 190 (1) (c) of the Code. On his own admission he had acted under the orders of the superior officer, and never pleaded that he had acted in his judicial capacity. Apart from the admission, the circumstance that no record was maintained of any information received by the officer or the grounds of his suspicion pursuant to which he could act in taking cognizance under section 190 (1)(c).

The conclusion that the officer had acted recklessly and maliciously in arresting the respondent has been reached by the concurrent findings of the Trial Court and the High Court, on the appreciation of evidence has to be upheld.

Appeal from the Judgment and Decree, dated 16th September, 1958 of the Assam High Court in First Appeal No. 14 of 1954.

*Naunil Lal*, Advocate, for Appellant

*A C Chatterjee*, Senior Advocate, (*D N Mukherjee*, Advocate, with him), for Respondent No 1.

The Judgment of the Court was delivered by

*Shah, J*—In an action for compensation for false imprisonment the Subordinate Judge, Lower Assam District, granted to the respondent Ajoy Kumar Mukherjee a decree for Rs 5,000. In appeal the High Court of Assam confirmed the decree. With certificate granted by the High Court under Article 133(1) (c) of the Constitution this appeal is preferred.

In March, 1950 in the district of Kamrup, State of Assam, there were communal disturbances resulting in rioting and arson. The appellant was at the material time Sub-Divisional Officer of the Barpeta Sub-Division and also held the office of Sub-Divisional Magistrate. A C Bhattacharjee was the Deputy Commissioner of the District and held the office of District Magistrate and B R Chakravarty was the Circle Inspector of Police at Barpeta. The respondent Ajoy Kumar Mukherjee owned an extensive agricultural estate within the Barpeta Division. On 17th March, 1950, at about 10.30 P.M. the respondent was arrested by the Circle Inspector of Police pursuant to an authority given by the appellant, and was confined in the lock up for the night. Next morning the respondent was produced before the appellant who remanded him to custody. Eventually by order of the local First Class Magistrate Mr J Barua the respondent was released on 20th March, 1950, on bail. It is common ground that neither on 17th March, 1950, nor on any date thereafter, was any formal complaint lodged against the respondent charging him with an offence in connection with the riots, nor was any information recorded at any police station against the respondent in that behalf. The respondent had to appear before the local First Class Magistrate on diverse occasions but the proceeding was adjourned because the Magistrate was awaiting "investigation reports" from the police. On 27th May, 1950 Mr J Barua recorded that

"a great confusion exists amongst police officers about the case. It is surprising that the officer-in-charge should refer to the C.I. (Circle Inspector) as authority for the arrest and the latter to the Sub-Divisional Officer. No case also seems to have been registered at the police station. I fail to see under strength of what the accused has been sent up. No FIR is also traceable in Court Office in which accused has been named. I find no justification for holding accused within the jurisdiction of Court under the present charge,

and he issued an order on 31st May, 1950, closing the proceeding.

The respondent then instituted the action, which gives rise to this appeal, against the State of Assam, Bhattacharjee the Deputy Commissioner, the appellant who was the Sub-Divisional Officer and Chakravarty the Circle Inspector of Police for compensation for false imprisonment. The respondent submitted that as an active member of the Peace Committee formed by the State Government in co-operation with the other leading citizens of the locality to bring about harmony between the two communities, he had "incurred displeasure" of the appellant, and that the latter had with a view to insult and disgrace him ordered his "arrest, detention and imprisonment maliciously, \* \* \* recklessly and without any lawful excuse or justification."

A joint written statement denying the averments made by the respondent was filed by the defendants. It was submitted by the defendants that the respondent was arrested by the Circle Inspector of Police at the instance of the Deputy Commissioner and the Sub-Divisional Officer because in their view there "were sufficient reasons based on credible information and reasonable suspicion" that the respondent was concerned in some offences committed by a section of the local community on the lands belonging to the respondent, and that the case against the respondent was investigated carefully and "ultimately for want of conclusive evidence against

him he was discharged by order dated 31st May, 1950". The plea raised by the defendants in the suit in substance was that the respondent was arrested and detained in *bona fide* exercise of executive power vested in them, there being "credible information and reasonable suspicion" that the respondent was concerned in some incidents for which a section of the local community was responsible : it was not pleaded that the appellant acted in discharge of his judicial duties as a Sub-Divisional Magistrate.

At the trial, evidence was led that information was received by the Deputy Commissioner and the appellant that the respondent was concerned in certain incidents which led to communal disturbances, and that in the course of discussions the Deputy Commissioner had asked the appellant to "take suitable action". The appellant stated that he had been orally directed by the Deputy Commissioner to issue orders of arrest of the respondent, and he acted in pursuance of that direction, and addressed the following letter Exhibit-A to the Circle Inspector of Police, directing that the respondent be arrested ;

"Deputy Commissioner has ordered the arrest of Sri Ajay Mukherjee, a resident of this town at once under section 436, Indian Penal Code.

(Sd.) Illegible.  
S.D.O.  
17-3-50"

The Deputy Commissioner denied that he had given any instructions for the arrest of the respondent : he stated that he had told the appellant about the reports received by him and by the Chief Minister that the respondent was concerned with incidents which led to rioting and arson, and that he had discussed the matter with the appellant and had told the appellant to take "suitable action" in the matter.

The Court of First Instance held that the arrest of the respondent was not made in exercise of any lawful authority and that the arrest "was reckless and without any lawful excuse", and that even though the information against the respondent was apparently credible, it was never acted upon either by the Deputy Commissioner or by the appellant for initiating any judicial proceeding against the respondent. Even though no express issue arose on the pleadings that the appellant was protected in respect of the acts done by him by the Judicial Officers' Protection Act, 1850, the Court of First Instance, it appears, allowed that plea to be raised, and held that on the evidence it was clear that the appellant in issuing an order for arrest of the respondent had not acted in the discharge of his judicial duties, but merely as an executive officer. The Subordinate Judge relied upon the following statement made by the appellant in cross-examination—

"I did not take cognizance of the complaint made to me. My order for arrest of the plaintiff was not the outcome of any complaint of which I took cognizance or of any police report. It was mainly due to the order of the Deputy Commissioner. I cannot say if there was any complaint by the party to the Deputy Commissioner or if any report by the Police. I cannot say from what source the Deputy Commissioner made the order of arrest of the plaintiff.

I had occasion to discuss with the Deputy Commissioner regarding the plaintiff. It is after that the order of the arrest of the plaintiff was made. I did not suggest to the Deputy Commissioner that a formal order for arrest to be made after an enquiry. It was not at my suggestion that the order for his arrest was made. I cannot say if the Deputy Commissioner took cognizance of these,"

and certain other circumstances, and held that the appellant had not, in ordering the arrest of the respondent, taken action as a Magistrate under section 204 of the Code of Criminal Procedure. On the view taken by him, the Subordinate Judge passed a decree against the appellant directing him to pay a sum of Rs. 5,000 as compensation, and dismissed the action against the other defendants.

Against the decree passed by the Subordinate Judge, two appeals were preferred to the High Court—one by the appellant challenging the decree passed against him, and the other by the respondent challenging the decree dismissing his suit against the other defendants. With the latter claim we are not concerned here. At the hearing of the appeal filed by the appellant Sarjoo Prasad, C.J., and Deka, J., disagreed. The learned Chief Justice substantially agreed with the Court of First

Instance that the appellant could not have the protection of the Judicial Officers' Protection Act, 1850. Deka, J., expressed a contrary opinion. The appeal was then referred to Mehrotra, J., who agreed with the opinion of Sarjoo Prasad, C.J.

In this appeal, the only question raised is that in ordering the arrest of the respondent the appellant acted in discharge of his judicial duties and he was on that account protected by the Judicial Officers' Protection Act, 1850. Section 1 of the Act, in so far as it is material, provided

\* No Judge Magistrate \* \* \* \* \* Collector or other person acting judicially shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty whether or not within the limits of his jurisdiction. Provided that he at the time in good faith believed himself to have jurisdiction to do or order the act complained of, \*

The statute is clearly intended to grant protection to Judicial Officers against suits in respect of acts done or ordered to be done by them in discharge of their duties as such officers. The statute, it must be noticed, protects a Judicial Officer only when he is acting in his judicial capacity and not in any other capacity. But within the limits of its operation it grants large protection to Judges and Magistrates acting in the discharge of their judicial duties. If the act done or ordered to be done in the discharge of judicial duties is within his jurisdiction, the protection is absolute and no enquiry will be entertained whether the act done or ordered was erroneously irregularly or even illegally, or was done or ordered without believing in good faith, that he had jurisdiction to do or order the act complained of. If the act done or ordered is not within the limits of his jurisdiction, the Judicial Officer acting in the discharge of his judicial duties is still protected if at the time of doing or ordering the act complained of he in good faith believed himself to have jurisdiction to do or order the act. The expression 'jurisdiction' does not mean the power to do or order the act impugned, but generally the authority of the judicial officer to act in the matter. *Tayen v Ram Lal*<sup>1</sup>

No formal complaint was laid against the respondent by any person, nor was any information recorded at any police station, and it appears that no investigation into any offence alleged to be committed by the respondent was commenced on or about 17th March, 1950, or at any time thereafter. The appellant undoubtedly was invested with the power of a Sub-Divisional Magistrate and under section 190 of the Code of Criminal Procedure he could take cognizance of any offence (a) upon receiving a complaint of facts which constitute such offence, (b) upon a report in writing of such facts made by any Police Officer, and (c) upon information received from any person other than a Police Officer, or upon his own knowledge or suspicion, that such offence has been committed. Under section 204 of the Code of Criminal Procedure, a Magistrate taking cognizance of an offence may, if in his opinion there is sufficient ground for proceeding, issue a warrant, if the offence be one in respect of which under the Second Schedule to the Code a warrant may issue for securing the attendance of the accused before him or before some other Magistrate having jurisdiction. Issue of a warrant after taking cognizance of an offence under section 190 would normally be an act done in the discharge of the judicial duty, even if it turns out that there were not sufficient grounds for the Magistrate to proceed against the accused. In the present case no warrant in Form 2 prescribed by the Code of Criminal Procedure in the Fifth Schedule was issued. The 1-ter Exhibit A on which reliance was placed was in form a direction given to the Circle Inspector of Police to arrest the respondent. It did not bear the seal of the Magistrate and it did not state that the respondent was charged with the offence under section 436, Indian Penal Code. But these irregularities may not affect the exercise of the power, if the power was in fact exercised under section 204 of the Code of Criminal Procedure. The only question to be determined therefore is whether the appellant had taken cognizance of the offence under section 190 of the Code, before issuing the order to arrest the respondent.

There being no formal complaint lodged before the appellant charging the respondent with having committed an offence under section 436, Indian Penal Code or any other offence, power under section 190 (1) (a) could not be exercised. And in the absence of a report in writing of the facts stating the offence made by any police officer, power under section 190 (1) (b) could not be exercised by the Magistrate. It is true that a Sub-Divisional Magistrate may under section 190 (1) (c) take cognizance of any offence upon information received from any person other than a police-officer or even upon his own knowledge or suspicion, that an offence has been committed. It is also true that the Deputy Commissioner has deposed that information was received that the respondent was concerned in certain incidents which led to rioting in the Kamrup District, and in the view of the Court of First Instance the information was apparently credible, but the appellant did not act upon the information as a Magistrate. He never even attempted to justify his action by pleading that he had done so. His sole plea was that he had acted under the orders of the Deputy Commissioner.

We are of the view that the Subordinate Judge and the majority of the Judges of the High Court were right in holding that the appellant had not the protection of the Judicial Officers' Protection Act. There was no plea in the written statement that the appellant was, in issuing the order for arrest of the respondent, acting in the discharge of his judicial duty and that on that account he was entitled to the protection of the Judicial Officers' Protection Act, 1850. He made an admission (which is already set out) that he had not taken cognizance of the offence. We are unable to agree with Counsel for the appellant that the admission only meant that the appellant had not taken cognizance of an offence under section 436, Indian Penal Code on a complaint under sub-section (1) (a) or on a report of a police officer under sub-section (1) (b) of section 190 of the Code of Criminal Procedure. The appellant had admitted that he had not taken cognizance of an offence against the respondent. He did not seek to make any reservation now suggested by his Counsel. The Court of First Instance and the High Court understood it as an admission without any implication or reservation, and the context in which the admission occurs makes it clear beyond all doubt that no implication or reservation was intended by the appellant.

The finding that the appellant had not taken cognizance under section 190 (1) (c) of the offence under section 436, Indian Penal Code, against the respondent is supported by several circumstances, apart from the admission. No record is maintained of any information received by the appellant or the grounds of his suspicion, pursuant to which he could act in taking cognizance of an offence under section 190 (1) (c). The record of the proceeding against the respondent commences with the first entry dated 18th March, 1950, recording that the respondent was produced under arrest and that he was remanded to custody. There is also the order passed by the Magistrate who ultimately closed the proceeding against the respondent. The order-sheet clearly shows that no officer was prepared to undertake responsibility of having directed the arrest of the respondent. The Circle Inspector pleaded that he acted under the orders of the appellant and the appellant pleaded that he acted under the orders of the Deputy Commissioner. The last-named officer denied that he had given any such authority to the appellant. At no stage of the proceeding, which ultimately ended in the order dated 31st May, 1950, was it even suggested that the appellant had in exercise of the powers under section 190 of the Code of Criminal Procedure taken cognizance of the offence under section 436, Indian Penal Code against the respondent and had directed that he be arrested. The informality of the letter Exhibit-A under which the Circle Inspector of Police was directed to arrest also lends some support to this inference. Absence of a plea that cognizance was taken of an offence against the respondent, viewed in the light of the admission made by the appellant that he had not taken cognizance of the offence against the respondent, but had acted merely in pursuance of the direction given by the Deputy Commissioner, and the subsequent proceedings taken against the respondent, establish that the arrest of the respondent was not made pursuant to the order made by a Magistrate in the discharge of his judicial duty. If, after taking cognizance

of the offence, the appellant had ordered that the respondent be arrested, no enquiry whether the appellant entertained a *bona fide* belief in the exercise of his jurisdiction could be made, for the power to issue a warrant for the arrest of a person who was reported to be or suspected to have committed an offence and for whose arrest a warrant could issue, was within the jurisdiction of the Magistrate.

The appellant held two offices—one an executive office and the other a judicial office. He pleaded protection against the liability arising out of his action substantially on the ground that he acted in the discharge of his duty under the direction given by his superior officer. In so pleading he was relying primarily upon his executive office. The Court of First Instance and the High Court have come to the conclusion that the appellant had “acted recklessly and maliciously” in arresting the respondent. That conclusion is based upon appreciation of evidence and has not been challenged before us. As a Judicial Officer the appellant has no protection, because he is not shown to have acted in ordering that the respondent be arrested in the discharge of the duties of his office as a Magistrate.

The appeal therefore fails and is dismissed with costs.

V S

*Appeal dismissed*

## THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT —K SUBBA RAO, RAOHUBAR DAYAL, J R MUDHOLKAR, R S. BAGIAWAT AND V RAMASWAMI, JJ

The Morvi Mercantile Bank Ltd, by Official Liquidator .. Appellants\*

v,

The Union of India .. Respondent

*Contract Act (IX of 1872) as amended by Indian Contract (Amendment) Act (1930) sections 172, 178 and 180—Pledge of goods covered by documents of title such as a railway receipt—If could be validly made by owner by transfer of the documents of title representing the goods—Endorsement of railway receipt as security for advances made to the owner of goods—If operates as a pledge of the goods covered by the railway receipt—Right of such endorsee to sue the railway for non-delivery of goods—Measure of damages*

By majority (with J R. Mudholkar and V Ramaswami JJ dissenting), A valid pledge of goods could be created by the owner of the goods by transferring documents of title representing the said goods. It would not be correct to say that by the amendment of section 178 of the Contract Act by the Indian Contract (Amendment) Act, 1930 the Legislature has taken away the right of an owner of goods to pledge the same by the transfer of documents of title to the said goods. A careful scrutiny of section 178 of the Contract Act as amended in 1930 and the other relevant provisions thereof indicates that the section assumes the power of an owner to pledge goods by transferring documents of title thereto and extends the power even to a mercantile agent. The general rule is expressed by the maxim *nemo dat quod non habet* i.e. no one can convey a better title than what he had. To this maxim, to facilitate mercantile transactions the Indian law has grafted some exceptions in favour of *bona fide* pledgees by transfer of documents of title from persons whether owners of goods or their mercantile agents who do not possess the full bundle of rights of ownership at the time the pledges are made. To confer a right to effect a valid pledge by transfer of documents of title relating to goods on owners of the goods with defects in title and mercantile agents and to deny it to the full owners thereof is to introduce an incongruity in to the Contract Act by construction. On the other hand, the real intention of the Legislature will be carried out if the said right is conceded to the full owner of goods and extended by the construction to owners with defects in title or the mercantile agents.

Under the Contract Act delivery of goods by one person to another under a contract as security for payment of a debt is a pledge. Ordinarily delivery of tangible property is essential to a true pledge, but where the law recognises that delivery of tangible symbol involves a transfer of possession of the property symbolized such a symbolic possession takes the place of physical delivery. A railway receipt is document of title to goods covered by it and a transfer of the said document for consideration effects a constructive delivery of the goods covered by it. An owner of goods can therefore make a valid pledge of them by transferring the railway receipt representing the said goods.

Where a firm executed a promissory note and also endorsed some railway receipts in favour of a bank on the security of which the bank advanced a loan of Rs. 20,000.

*Held*, the three transactions, namely, the advancing of loan, the execution of the promissory note and the endorsement of the railway receipts, together formed one transaction and their combined effect was that the bank would be in control of the goods till the debt was discharged. Hence the firm by endorsing the railway receipts in favour of the bank for valuable consideration created a valid pledge of the goods covered by the said receipts. The bank as pledgees of the goods was therefore entitled to sue the railway for non-delivery of the goods covered by the receipts.

Under section 180 of the Contract Act a pledge being a bailment of goods as security for payment of a debt, the pledgee will have the same remedies as the owner of the goods would have against a third person for deprivation of the said goods or injury to them. If so, the bank in the instant case would be entitled to recover the entire value of the goods amounting to Rs. 35,000 as damages from the railway and not only the amount of Rs. 20,000 secured under the pledge.

Per *Mudholkar and Ramaswami, JJ.*—Under the English law, in the case of documents of title other than bills of lading, a pledge of the documents is merely a pledge of the *ipsa corpora* of them, for the transfer of the documents does not change the possession of the goods unless the custodian (carrier warehouse man or such) was notified of the transfer and agreed to hold in future as bailee for the pledgee. After the passing of the Indian Contract (Amendment) Act, 1930, the legal position with regard to the pledge of railway receipts is exactly the same in Indian law as it is in English law and consequently the owner of the goods cannot pledge the goods represented by the railway receipt unless the railway authorities are notified of the transfer and they agree to hold the goods as baile for the pledgee.

There are no rights created merely by reason of the endorsement of a railway receipt between the endorsee and the railway company which has issued the railway receipt to the consignee, the only remedy of the endorsee being against the endorser. The endorsee may bring an action as an assignee of the contract of carriage but then the assignment has to be proved as in every other case. It is true that by reason section 137 of the Transfer of Property Act the provisions relating to the transfer of an actionable claim do not apply to a railway receipt and the assignment need not be in any particular form, but a railway receipt is not like a negotiable instrument. It is also apparent that subject to the exceptions mentioned in sections 30 and 53 of the Sales of Goods Act, 1930 and section 178 of the Contract Act, 1872, its possessor cannot give a better title to the goods than he has. The negotiation of the railway receipt may pass the property in the goods, but it does not transfer the contract contained in the receipt of the statutory contract under section 74-E of the Railway Act. Negotiability is a creature of statute or mercantile usage, not of judicial decisions apart from either. So, in the absence of any usage of trade or any statutory provision to that effect, a railway receipt cannot be accorded the benefits which flow from negotiability under the Negotiable Instruments Act, so as to entitle the endorsee as the holder for the time being of the document of title to sue the carrier, the railway authorities, in his own name. If the claim of the plaintiff is as an ordinary assignee of the contract of carriage, then the plaintiff has to prove the assignment in his favour. An endorsement made by the consignee on the face of the railway receipt requesting the railway company to deliver the goods to the endorsee merely conveys to the railway that the person in whose favour the endorsement is made by the consignee is constituted by him a person to whom he wishes that delivery of the goods should be made on his behalf.

Appeal from the Judgment and Decree dated 10th January, 1958 of the Bombay High Court in Appeal No. 375 of 1953.

*J. C. Bhatt and B. R. Agarwala*, Advocates and *K. H. Puri*, Advocate for *M/s. Gagrati & Co.*, for Appellants (In C.A. No. 474 of 1962) and Respondent (In C.A. No. 475 of 1962).

*Niren De*, Additional Solicitor-General, (*N. D. Karkhanis*, Advocate, *B. R. G. K. Achar*, Advocate for *R. N. Sachithy*, Advocate with him), for Respondent (In C.A. No. 474 of 1962) and Appellant (In C.A. No. 475 of 1962).

The Court delivered the following Judgments—

*Subba Rao, J.* (On behalf of himself, *Raghubar Dayal*, and *Bachawat, JJ.*:—On 4th October, 1949, *M/s. Harshadrai Mohanlal and Co.*, a firm doing business at Thana, Bombay, hereinafter called 'the firm', entrusted 4 boxes alleged to have contained menthol crystals to the then G.I.P. Railway for carriage from Thana to



Okhla near Delhi under a railway receipt bearing No. 233/27. On 11th October, 1949, the firm consigned 2 more such boxes to Okhla from Thana under 2 railway receipts bearing Nos 233/35 and 233/36. All the said 6 boxes were marked with the name of the said firm and were consigned to "self". The said firm endorsed the relevant railway receipts in favour of Morvi Mercantile Bank Ltd., hereinafter called the Bank, against an advance of Rs. 20,000 made by the Bank to the firm. The said consignments did not reach Okhla. The railway company offered to deliver certain parcels to the Bank, but the Bank refused to take delivery of the same on the ground that they were not the goods consigned by the firm. As the railway failed to deliver the boxes, the Bank, as the endorsee of the said railway receipts for valuable consideration, filed Civil Suit No. 50 of 1950 in the Court of the Civil Judge, Senior Division, Thana, against the Union of India through the General Manager, Central Railway, Bombay, for the recovery of Rs. 35,500, being the value of the goods contained in the said consignments as damages. The defendant in the written statement averred that on 1st February, 1950, the railway company offered to deliver all the consignments to the Bank, but the latter wrongfully refused to take delivery of the same on the ground that the consignments were not identical to the ones consigned from Thana; it put the plaintiff to strict proof of the allegation that the consignments contained menthol crystals as alleged or that the aggregate value of the said consignments was Rs. 35,500 or that the railway receipts were endorsed in favour of the plaintiff for valuable consideration.

The learned Civil Judge found as follows: (1) The boxes consigned by the firm contained menthol crystals and by the wrongful conduct of the employees of the railway administration the contents of the boxes were lost; (2) the said consignments were not offered for delivery to the Bank, but what was offered were different consignments containing caustic soda; (3) the relevant railway receipts were endorsed by the firm in favour of the Bank for valuable consideration; and (4) the Bank, as endorsee of the railway receipts, was not entitled to sue the railway company on the railway receipts for loss of the consignments. On those findings the suit filed by the Bank was dismissed with costs. The Bank preferred an appeal to the High Court against the decision of the learned Civil Judge, being First Appeal No. 375 of 1953.

The appeal was heard by a Division Bench of the Bombay High Court, consisting of J.C. Shah and Gokhle, JJ. The learned Judges agreed with the learned Civil Judge on the first 3 findings; but on the 4th finding they took a different view. They held that the Bank, as endorsee of the said railway receipts, was entitled to sue for compensation for the loss suffered by it by reason of the loss of the consignments, but, as pledgees of the goods, it suffered the loss only to the extent of the loss of its security. On that view, the learned Judges gave a decree to the Bank for a sum of Rs. 20,000 advanced by it with interest and proportionate costs in both the Courts. The plaintiff as well as the defendant preferred, by certificate, cross appeals to this Court.

Learned Additional Solicitor General raised before us the following points: (1) In law the endorsement of a railway receipt does not constitute a pledge; (2) an endorsement of a railway receipt for consideration constitutes at the most a pledge of the railway receipt and not the goods covered by it, and, therefore, in the present case the Bank acquired only a right to receive the goods covered by the relevant receipts from the railway; and (3) if the endorsement of the railway receipts does not constitute in law a pledge of the goods, the Bank has no right to sue for compensation, as, though the proprietary right in the goods was transferred to it, the right to sue under the contracts did not pass to it.

The decision on the first point depends upon the scope of the legal requirements to constitute a pledge under the Indian law. That calls for a careful scrutiny of all the relevant provisions of the Indian Contract Act, the Indian Sale of Goods Act and the Transfer of Property Act, for their combined consideration yields the answer to the problem raised.

Under the Contract Act, delivery of goods by one person to another under a contract as security for payment of a debt is a pledge. Ordinarily delivery of tangible property is essential to a true pledge; but where the law recognizes that delivery of tangible symbol involves a transfer of possession of the property symbolized, such a symbolic possession takes the place of physical delivery. This short but difficult question, therefore, is whether the Indian law equates the railway receipts with the goods covered by them for the purpose of constituting delivery of goods within the meaning of the Contract Act. Before the amendment of section 178 of the Contract Act and the passing of the Sale of Goods Act, 1930, the scope of railway receipt *vis-a-vis* the goods covered by them came up for consideration before the Judicial Committee in *Ramdas Vithaldas Durbar v. S. Amerchand & Co.*<sup>1</sup> The head-note of that case succinctly gives the following facts: Sellers of cotton consigned it to the buyer in Bombay, and forwarded to him receipts issued by the railway company which had undertaken the carriage. The receipts provided that they should be given up at the destination by the consignee, and that if he did not himself attend to take delivery he must indorse on the receipt a request for delivery to whom he wished it to be made. The evidence showed that similar receipts for cotton were used in the ordinary course of business in Bombay as proof of the possession and control of the goods therein referred to, or as authorising the holder to receive or transfer the goods. The consignee indorsed and delivered the receipts as security for advances made specifically upon them in good faith. The sellers sought to stop the cotton in transit. The Judicial Committee held that the railway receipts were instruments of title within the meaning of the Indian Contract Act, 1872, section 103, and that the sellers were therefore not entitled to stop the goods except upon payment or tender to the pledgees of the advances made by them. This decision lays down 3 propositions, namely (i) the railway receipts in question in that case were used in the ordinary course of business in Bombay as proof of possession and control of the goods therein referred to, or as authorising the holder to receive or transfer the goods; (ii) such railway receipts were documents of title and a valid pledge of the goods covered by the receipts could be made under the Contract Act, before it was amended in 1930, by endorsing and delivering the same as security for advances made to the owner of the goods. It may be noticed at this stage that under the Contract Act before it was amended in 1930 there was no definition of the expression "documents of title," but there was one in the Indian Factors Act (XX of 1844) which, with certain modifications, made the provisions of the English Factors Act, 1842, applicable to British India. The last mentioned Acts defined the expression "documents of title to goods" as including any bill of lading dock-warrant, ware-house keeper's certificate, wharfinger's certificate, warrant or order for the delivery of goods and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented. Railway receipt was *eo nomine* not included in the definition. But the Privy Council, on the basis of the evidence adduced in that case, brought the railway receipts under that part of the definition describing generally the documents of title to goods. It may also be noticed that the Judicial Committee, though its attention was called to the provisions of sections 4 and 137 of the Transfer of property Act, preferred to decide that case *de hors* the said provisions. In the *Explanation* to section 137 of the Transfer of Property Act, 1882, which was introduced by the Amending Act II of 1900, the definition of the expression "mercantile document" is practically the same as that found in the Indian Factors Act noticed by the Judicial Committee in the decision cited *supra*, with the difference that it expressly includes therein railway receipt. Under section 4 thereof, the Chapter and the sections of the Act shall be taken as part of the Indian Contract Act, 1872. In 1930 Parliament in enacting the Indian Sale of Goods Act, 1930, presumably borrowed the definition of "documents of title to goods" from the Indian Factors Act and the English

1. (1916) L.R. 43 I.A. 164 : 31 M.L.J. 541.

Factors Act noticed by the Judicial Committee, but expressly included in the definition of the railway receipt. This indicates the legislative intention to accept the mercantile usage found by the Judicial Committee in *Ramdas Vilaldas Durbar v S Amerchand & Co*<sup>1</sup>. The same definition was incorporated by reference in the Explanation to section 178 of the Contract Act as amended in the year 1930. This definition is also in accord with the definition of "mercantile document of title to goods" in the Explanation to section 137 of the Transfer of Property Act. The Judicial Committee had another occasion to consider the question of pledge of railway receipt in *Official Assignee of Madras v Mercantile Bank of India, Ltd*<sup>2</sup>. The facts in that case were as follows. The insolvents did a large business in groundnuts, which they purchased from the up-country growers, the nuts were then despatched by rail and arrived in Madras by one or other of the two railways, the Madras and Southern Mahratta Railway or the South Indian Railway. Under an arrangement between the said Railways and the Madras Port Trust the consignments of nuts when received were deposited in the godowns of the Madras Port Trust. The general course of business was for the insolvents to obtain from the railway companies in respect of each consignment or wagon load a railway receipt. The insolvents obtained loans from the respondent Bank after sending to the said Bank the railway receipts duly endorsed in blank and also after executing a promissory note for the amount and a letter of hypothecation. When the goods arrived at the port, delivery was taken from the Port Trust against the railway receipts. At the time the insolvents were adjudicated the bags of groundnuts in question in that case were either in transit on the railway or in the transit sheds or godowns of the Port Trust. On those facts, the main question was whether the pledge of the railway receipts was a pledge of the goods represented by them or merely a pledge of the actual documents. If there was a valid pledge before the insolvency the Bank would be entitled to receive the amount realised by the sale of the goods, if not the Official Assignee would be entitled to it. The Judicial Committee, after considering its earlier decision in *Ramdas Vilaldas Durbar's case*<sup>1</sup> and all the relevant provisions which we have noticed earlier, came to the conclusion that there was a valid pledge of the goods represented by the receipts. It may be noticed that this decision also turned upon the relevant provisions of the Contract Act before its amendment in 1930, though at the time the decision was made the amendment came into force. On the question whether a pledge of a document is a pledge of the goods as distinct from the document, the Judicial Committee observed

Their Lordships likewise in the present case see no reason for giving a different meaning to the term (documents of title to goods) in section 178 from that given to the terms in sections 102 and 103, in addition a railway receipt is specifically included in the definition of "mercantile document of title to goods" by section 137 of the Transfer of Property Act 1882 which, in virtue of section 4 of the Act is to be taken as part of the Contract Act as being a section relating to contracts. A railway receipt is now included in the definition of documents of title to goods in section 2, sub-section (4) of the Indian Sale of Goods Act 1930.

On the construction of the expression "person" in section 178 of the Contract Act, it was argued that the said expression took in only a mercantile agent and that the law in India was the same as in England. Rejecting that plea, the Judicial Committee remarked at page 426 thus

"Their Lordships did not in that case see any improbability in the Indian Legislature having taken the lead in a legal reform.

It may well have seemed that it was impossible to justify a restriction on the owner's power to pledge which was not imposed on the like powers of the mercantile agent. The same observation may well be true in regard to the words now being considered. The reasonableness of any such change in the law is well illustrated by the facts of the present case where it was clearly intended to pledge the goods, not merely the railway receipts, and the respondents have paid in cash the advances they made on that footing. In these circumstances it would be unduly a hardship that they should lose their security."

1 [1916] L.R. 43 I.A. 161 31 M.L.J. 511 M.W. 181 C.B. M.L.J. 26

2 [1931] L.R. 61 I.A. 416, 432 I.L.R. 58

These pregnant observations show that there is no justification for the distinction that is being maintained in England between a pledge of a bill of lading and the pledge of documents of title other than a bill of lading. The Judicial Committee in this decision clearly laid down, after noticing all the relevant provisions of the Contract Act, the Transfer of Property Act and the Sale of Goods Act, that railway receipts were documents of title and the goods covered by the documents could be pledged by transferring the documents. This decision is in accord with the view expressed by us on a fair reading of the said provisions.

Even so, it is contended that by the amendment of section 178 of the Contract Act in 1930, the Legislature has taken away the right of an owner of goods to pledge the same by the transfer of documents of title to the said goods. Under the old section "a person" who was in possession of any goods etc. might make a valid pledge of such goods, whereas under the present section "a mercantile agent," subject to the conditions mentioned therein, is authorized to make a pledge of the goods by transferring the documents of title. Therefore, the argument proceeds, a person other than a mercantile agent cannot make a valid pledge of goods by transferring the documents representing the said goods. This argument appears to be plausible and even attractive; but, if accepted, it will lead to anomalous results. It means an owner of goods cannot pledge the goods by transferring the documents of title, whereas his agent can do so. As the Privy Council pointed out it is impossible to justify a restriction on the owner's power to pledge when there is no such restriction imposed on the like powers of a mercantile agent. A careful scrutiny of section 178 of the Contract Act and the other relevant provisions thereof indicates that the section assumes the power of an owner to pledge goods by transferring documents of title thereto and extends the power even to a mercantile agent. A pledge is delivery of goods as security for payment of a debt. If a railway receipt is a document of title to the goods covered by it, transfer of the said document for consideration effects a constructive delivery of the goods. On that assumption if we look at section 178 of the Contract Act, the legal position is apparent. The material part of section 178 of the Contract Act reads :

"Where a mercantile agent is, with the consent of the owner, in possession of goods or the documents of title to goods, any pledge made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the pawnee acts in good faith and has not at the time of the pledge notice that the pawnor has not authority to pledge."

The section emphasizes that a mercantile agent shall be in possession of documents of title with the consent of the owner thereof; if he is in such possession and pledges the goods by transferring the documents of title to the said goods, by fiction, he is deemed to have been expressly authorized by the owner of the goods to make the same. The condition of consent and the fiction of authorization indicate that he is doing what the owner could have done. So too, section 30 of the Indian Sale of Goods Act discloses the legislative mind. The relevant part of the said section reads :

"Where a person, having sold goods, continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of the previous sale shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same."

This sub-section shows that a person who sold the goods as well as a mercantile agent acting for him can make a valid pledge in the circumstances mentioned therein. If an owner of goods or his mercantile agent, after the owner has sold the goods, can make a valid pledge by transferring the documents of title to the goods, it would lead to an inconsistent position if we were to hold that an owner who has not sold the goods cannot pledge the goods by transferring the documents of title. Sub-section (2) of section 30 of the Indian Sale of Goods Act relevant to the present enquiry reads :

"Where a person, having bought or agreed to buy goods, obtains, with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer by that person or

by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods shall have effect as if such lien or right did not exist."

This sub-section clearly recognizes that a buyer or his mercantile agent can pledge goods by transferring the documents of title thereto, it protects a *bona fide* pledgee from the buyer against any claim by the original owner based on the lien or any other right still left in him. If the owner—the purchaser becomes the owner—cannot pledge the goods at all by transfer of documents of title, the protection given under sub-section (2) of section 30 of the Sale of Goods Act to a *bona fide* purchaser is unnecessary. The material part of section 53 (1) of the Sale of Goods Act reads :

"Subject to the provisions of this Act, the unpaid seller's right of lien or stoppage in transit is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented thereto

Provided that where a document of title to goods has been issued or lawfully transferred to any person as buyer or owner of the goods, and that person transfers the documents to a person who takes the document in good faith and for consideration, then, if such last mentioned transfer was by way of sale, the unpaid seller's right of lien or stoppage in transit is defeated, and, if such last mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or stoppage in transit can only be exercised subject to the rights of the transferee

The sub-section protects a *bona fide* pledgee from an owner against any rights still subsisting in his predecessor-in-interest. This assumes that the owner can pledge the goods by transfer of the relevant documents of title. The said sections embody statutory exceptions to the general rule that a person cannot confer on another a higher title than he possesses.

The argument that section 178 of the Contract Act, as amended in 1930, restricts the scope of the earlier section and confines it only to a mercantile agent was noticed by the Judicial Committee in *Official Assignee of Madras v. Mercantile Bank of India, Ltd.*<sup>1</sup> and it observed therein :

"The Indian Legislature may well have appreciated in 1872 the exigencies of business even though in 1930 they recanted. Or perhaps they did not appreciate fully the effect of the actual words of the section."

These observations indicate that the Judicial Committee did not express any final opinion on the construction of the amended section 178 of the Contract Act as the question in the appeal before it related to the unamended section. Further, it did not notice the other sections referred to earlier which throw a flood of light on the true meaning of the terms of section 178 of the Contract Act, as it now stands. This conclusion also accords with the view expressed by Bachawat, J., in *Commissioner for the Port Trust of Calcutta v. General Trading Corporation Ltd.*<sup>2</sup>

The Indian decisions cited at the Bar do not deal with the question whether a valid pledge of goods can be effected by transfer of documents of title, such as a railway receipt, representing the goods; they were mainly concerned with the question whether an endorsee of a railway receipt for consideration could maintain an action on the basis of the contract embodied in the said receipt, see *The Firm of Dolatram Durakdas v. The Bombay Baroda and Central India Railway Co.*<sup>3</sup>; *Shah Mulji Deoji v. Union of India*<sup>4</sup>, *Commissioner for the Port Trust of Calcutta v. General Trading Corporation Ltd.*<sup>5</sup>, and *Union of India v. Taherali*<sup>6</sup>. These raise a larger question on which there is a conflict of opinion. In the view we have taken on the question of pledge, it is not necessary to express our opinion thereon in these appeals.

The law on the subject, as we conceive it, may be stated thus : An owner of goods can make a valid pledge of them by transferring the railway receipt representing the said goods. The general rule is expressed by the maxim *nemo dat quod non habet*, i.e., no one can convey a better title than what he had. To this maxim,

1. (1934) L.R. 61 I.A. 416, 432 - I.L.R. 58 Mad. 181 : 68 M.L.J. 26.

2. A.I.R. 1964 Cal. 290.

3. (1914) I.L.R. 38 Bom. 659

4. A.I.R. 1957 Nag. 31.

5. (1956) 58 Bom. L.R. 650

to facilitate mercantile transactions, the Indian law has granted some exceptions, in favour of *bona fide* pledgees by transfer of documents of title from persons, whether owners of goods or their mercantile agents who do not possess the full bundle of rights of ownership at the time the pledges are made. To confer a right to effect a valid pledge by transfer of documents of title relating to goods on owners of the goods with defects in title and mercantile agents and to deny it to the full owners thereof is to introduce an incongruity into the Act by construction. On the other hand, the real intention of the Legislature will be carried out if the said right is conceded to the full owner of goods and extended by construction to owners with defects in title or their mercantile agents.

We are glad that, on a reasonable construction of the material provisions of the relevant Acts, we have been able to reach this conclusion. To accept the contentions of the respondents to the contrary would be a retrograde step and would paralyse the entire mechanism of finance of our internal trade. In this vast country where goods are carried by railway over long distances and remain in transit for long periods of time, the railway receipt is regarded as a symbol of the goods for all purposes for which a bill of lading is so regarded in England.

The next question is whether the plaintiff would be entitled to recover the full value of the consignments amounting to Rs. 35,500 or, as the High Court held, only the amount of Rs. 20,000 with interest, *i.e.*, the amount secured under the pledges. The answer to this question depends upon the construction of section 180 of the Contract Act. It reads :

"If a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made ; and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury."

Under this section, a pledge being a bailment of goods as security for payment of a debt, the pledgee will have the same remedies as the owner of the goods would have against a third person for deprivation of the said goods or injury to them. If so, it follows that the Bank, being the pledgee, can maintain the present suit for the recovery of the full value of the consignments amounting to Rs. 35,500.

The last question is whether the Bank was the pledgee of the goods or was only the pledgee of the documents of title whereunder they could only keep the documents against payment by the consignee as contended on behalf of the Railway. The firm borrowed a sum of Rs. 20,000 from the Bank and executed a promissory note, Exhibit 104, dated 6th October, 1949, in its favour. It also endorsed the railway receipts Nos. 233/27, 233/35 and 233/36 in favour of the Bank. The Accountant of the Bank deposed that the railway receipts were endorsed in favour of the Bank, which had advanced the said amount to the firm on the security of the said railway receipts. The evidence of this witness was not challenged in the High Court. The Bank advanced a large amount of money to the firm. The three transactions, namely, the advancing of loan, the execution of the promissory note and the endorsement of the railway receipts, together form one transaction. Their combined effect is that the Bank would, be in control of the goods till the debt was discharged. This is a well known practice followed by Banks. The Judicial Committee both in *Ramdas Vithaldas Durbar v. S. Amerchand & Co.*<sup>1</sup>, and *the Official Assignee of Madras v. The Mercantile Bank of India, Ltd.*<sup>2</sup>, held that such a transaction was a pledge. We, therefore, hold on the facts of this case that the firm by endorsing the railway receipts in favour of the Bank for consideration pledged the goods covered by the said receipts to the Bank.

In this view it is not necessary to express our opinion on the question whether if the transaction was not a pledge of the goods, the Bank would be entitled to sue on the basis of the contract entered into between the firm and the Railway.

No other question was raised. In the result, Civil Appeal No. 474 of 1962 filed by the Bank is allowed ; and Civil Appeal No. 475 of 1962 filed by the Railway is dismissed. The plaintiff's suit is decreed with costs throughout.

1. (1916) L.R. 48 I.A. 164; 31 M.L.J. 541. 181 : 68 M.L.J. 26.

2. (1934) L.R. 61 I.A. 416; I.L.R. 58 Mad.

*Ramaswami, J.*—(On behalf of *J. R. Mudholkar, J.*, and himself). We regret we are unable to agree with the judgment pronounced by our learned Brother Subba Rao, J.

On 4th October, 1949, M/s. Harshadrai Mohanlal & Co. (hereinafter referred to as the firm) entrusted 4 boxes containing "menthol crystal" to the then G.I.P. Railway for carriage from Thana railway station to Okhla near Delhi. On 11th October, 1949, the firm consigned 2 more boxes also alleged to have contained "menthol crystal" to Okhla from Thana railway station. The Railway Receipts issued were numbered 233/27, 233/35 and 233/36. All the six boxes were consigned to "self." It is alleged that the Railway Receipts with regard to these six boxes were endorsed in favour of Morvi Mercantile Bank Ltd. (hereinafter referred to as the plaintiff-bank) against an advance of Rs. 20,000 by the plaintiff-bank on security of the Railway Receipts. The G.I.P. Railway offered to deliver the boxes at Okhla railway station but the plaintiff-bank declined to accept the same alleging that the boxes were not those which were consigned from Thana station. The plaintiff-bank filed Civil Suit No. 50 of 1950 in the Court of the Civil Judge, Senior Division, Thana, claiming a sum of Rs. 35,000 as damages for breach of contract. The suit was contested by the defendants on the ground that identical boxes which were consigned by the firm at Thana were offered to the plaintiff-bank who declined to accept the same and the Railway Administration had not committed any breach of contract and, therefore, the Union of India was not liable to pay any damages. The trial Judge held that the boxes consigned by the firm contained "menthol crystals" and by the unlawful conduct of the employees of the railway administration the contents of the boxes were lost, but he took the view that the plaintiff-bank, as endorsee of the railway receipts, was not entitled to sue for compensation for loss of the consignments. In taking that view the learned Civil Judge followed a decision of the Bombay High Court in *Shamji Bhanji & Co. v. North Western Railway Company*<sup>1</sup>. The Civil Judge accordingly dismissed the suit by a judgment and decree dated 15th January, 1953. Against that decision the plaintiff bank preferred an appeal to the Bombay High Court which confirmed the findings of the Civil Judge that the Railway failed to deliver the boxes at Okhla and the boxes contained "menthol crystals." The High Court also held that the plaintiff-bank as assignees of the railway receipts was entitled to bring a suit for damages for breach of contract against the Union of India though the damages would be limited to the loss of its security. In taking this view the Bombay High Court relied upon its previous decision in *The Union of India v. Taherali Isaji*<sup>2</sup>.

The first question for determination in this case is whether there was a valid pledge of boxes of "menthol crystals" in favour of the plaintiff-bank by endorsement on the railway receipts by the firm.

In English Law a pledge arises when goods are delivered by one person called the "pledgor" to another person called the "pledgee" to be held as security for the payment of a debt or for discharge of some other obligation upon the express or implied understanding that the subject-matter of the pledge is to be restored to the pledgor as soon as the debt or other obligation is discharged. It is essential for the creation of a pledge that there should be a delivery of the goods comprised therein. In other words, a pledge cannot be created except by delivery of the possession of the thing pledged, either actual or constructive. It involved a bailment. If the pledgor had actual goods in his physical possession, he could effect the pledge by actual delivery; but in other cases he could give possession by some symbolic act, such as handing over the key of the store in which they were. If, however, the goods were in the actual physical possession of a third person, who held for the bailor so that in law his possession was that of the bailor, this pledge could be effected by a change of the character of the possession of the third party, that is by an order to him from the pledgor to hold for the pledgee, the change being perfected by the third party attorning to the pledgee, thus acknowledging that he thereupon held for the latter.

There was thus a change of possession and a constructive delivery : the goods in the hands of the third party came by this process constructively in the possession of the pledgee. But where goods were represented by documents the transfer of the documents did not change the possession of the goods, save for one exception, unless the custodian (carrier, warehouseman or such) was notified of the transfer and agreed to hold in future as bailee for the pledgee. The one exception was the case of bills of lading, the transfer of which by the law merchant operated as a transfer of the possession of, as well as the property in, the goods. This exception has been explained on the ground that the goods being at sea the master could not be notified. The true explanation was perhaps that it was a rule of the law merchant, developed in order to facilitate mercantile transactions, whereas the process of pledging goods on land was regulated by the narrower rule of the common law.

The position in English Law, therefore, was that in the case of delivery of documents of title other than bills of lading, a pledge of the documents is merely a pledge of the *ipsa corpora* of them, for the transfer of the documents does not change the possession of the goods unless the custodian (carrier, warehouseman or such) was notified of the transfer and agreed to hold in future as bailee for the pledgee. In *Inglis v. Robertson and Baxter*<sup>1</sup>, it was held by the House of Lords that where goods are lodged in warehouses in Scotland a pledgee of the goods must, to make effective all real rights which depends on the constructive delivery of the goods, give notice of the pledge to the warehouse-keeper. The Factors Act, 1889, enacts :

"Section 3. A pledge of the documents of title to goods shall be deemed to be a pledge of the goods ; and

Section 1. 'For the purposes of this Act' (sub-section (5) 'The expression 'pledge' shall include any contract, pledging, or giving a lien or security on, goods, whether in consideration of an original advance or of any further or continuing advance or of any pecuniary liability'."

Section 9 prescribes that the effect of delivery or transfer of the documents of title of the goods under any pledge etc., by a person who having bought the goods obtains with the consent of the seller possession of the goods or documents of title, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner. Goods were stored by G, a domiciled Englishman, in a bonded warehouse in Glasgow, transferred into the name of G. as owner ; and that warehouse-keeper issued to G. delivery orders showing that the goods were held to G's. order 'or assigns by endorsement hereon'. G. obtained a loan from I., an English merchant, and delivered to him in England a letter of hypothecation stating that he deposited a part of the goods with him in security, with power of sale, and G. endorsed and handed to I the delivery warrants. I did not intimate or give notice of the right he had acquired to the warehouse-keeper. R. and B., claiming as personal creditors of G., arrested the goods in the hands of the warehouse-keeper and then raised an action against him in the Scottish Court claiming through the arrestment a preferable right thereto. It was held by the House of Lords that section 3 of the Factors Act, 1889, was merely intended to define the full effect of the pledge of the documents of title made by a mercantile agent, and that it had no application to the case of the pledge of the documents of title by one in the position of G., who was not a mercantile agent within the meaning of the Act ; nor was G. a pledgor within section 9 of the same Act. At pages 625 to 627 Lord Watson states :

"I can see no reason to doubt that, by Scottish law as well as English, the indorsement and handing over of delivery orders in security of a loan, along with a letter professing to hypothecate the goods themselves, is sufficient in law, and according to mercantile practice, to constitute a pledge of the documents of title, whatever may be the value and effect of the right so constituted. In my opinion, the right so created, whether in England or in Scotland, will give the pledgee a right to retain the *ipsa corpora* of the documents of title until his advance is repaid. The crucial question in this case is whether the right goes farther, and vests in the pledgee of the documents, not a *jus ad rem* merely, but a real interest in the goods to which these documents relate.

It was not disputed by the appellant's Counsel, and it is hardly necessary to repeat, that by the common law of Scotland the indorsation and hypothecation of delivery orders, although it may give



the pledgee a right to retain the documents does not give him any real right in the goods which they represent. He can only attain to that right by presenting the delivery orders to the custodian by whom they were granted and obtaining delivery of the goods from him or by making such intimation of his right to the custodian as will make it the legal duty of the latter to hold the goods for him. His right which in so far as it relates to the goods is in the nature of a *ius ad rem* will be defeated if before he has either obtained delivery or given such intimation the goods are validly attached in the hands of the custodian by a creditor of the person for whom the custodian holds them.

The principle is reiterated by the House of Lords in *Dublin City Distiller Ltd v Doherty*<sup>1</sup> in which the plaintiff advanced moneys to a distillery company on the security of manufactured whisky of the company stored in a warehouse. Neither the company nor the excise officer could obtain access to the warehouse without the assistance of the other and the whisky could only be delivered out on presentation to the excise officer of a special form of warrant supplied by the Crown. On the occasion of each advance the company entered the name of the plaintiff in pencil in their stock book opposite the particulars of the whisky intended to be pledged and delivered to the plaintiff (1) an ordinary trade invoice and (2) a document called a warrant, which described the particulars of the whisky and stated that it was deliverable to the plaintiff or his assigns. It was held by the House of Lords that the plaintiff was not entitled to a valid pledge on the whisky comprised in the warrants. At pages 843 and 847 of the Report Lord Atkinson states the law on the point as follows:

'As to the second question it was not disputed that according to the law of England, and indeed of Scotland a contract to pledge a specific chattel even though money be advanced on the faith of it is not in itself sufficient to pass any special property in the chattel to the pledgee. Delivery is in addition absolutely necessary to complete the pledge but of course it is enough if the delivery be constructive or symbolical as it is called instead of actual.'

The example of constructive delivery frequently given is the delivery of the key of the store or house in which the goods have been placed, but that is because in the words of Lord Hardwicke it is the way of coming at the possession or to make use of the thing, *Ward v Turner*<sup>2</sup>.

The giving by the owner of goods of a delivery order to the warehouseman does not unless some positive act be done under it operate as a constructive delivery of the goods to which it relates *McCowan v Smith*<sup>3</sup>. And the delivery of a warrant such as those delivered to the respondent in the present case is in the ordinary case according to Parke B. no more than an acknowledgment by the warehouseman that the goods are deliverable to the person named therein or to any one he may appoint. The warehouseman holds the goods as the agent of the owner until he has attorned in some way to this person, and agreed to hold the goods for him then and not till then does the warehouseman become a bailee for the latter and then, and not till then is there a constructive delivery of the goods. The delivery and receipt of the warrant does not per se amount to a delivery and receipt of the goods. *Faith v Hunt*<sup>4</sup>, *Bentley v Burn*<sup>5</sup>.

In our opinion, the position in Indian Law is not different. Section 172 of the Contract Act which defines a 'pledge' affirms the English Common Law. Section 172 states that 'the bailment of goods as security for payment of a debt or performance of a promise' is called a 'pledge'. The bailor in this case called the 'pawnor' and the bailee is called the 'pawnee'. According to section 148 of the Contract Act 'a bailment is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished be returned or otherwise disposed of according to the directions of the persons delivering them. The person delivering the goods is called the 'bailor'. The person to whom they are delivered is called the 'bailee'. Section 149 states that the delivery to the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person authorised to hold them on his behalf. Reference should also be made to section 178 of the Contract Act, as it stood before the Indian Contract (Amendment) Act, 1930. The original section 178 states

A person who is in possession of any goods or of any bill of lading dock warrant warehouse keeper's certificate wharfinger's certificate or warrant or order for delivery or any other document of title to goods may make a valid pledge of such goods or documents provided that the pawnee ac-

1 L.P. (1914) A.C. 823  
2 (1751) 2 Ves. Sen. 431 at 443  
3 (1849) 2 H.L.C. 309

4 16 M. & W. 119  
5 (1824) 3 B. & C. 423.

in good faith and under circumstances which are not such as to raise a reasonable presumption that the pawnor is acting improperly :

Provided also that such goods or documents have not been obtained from the lawful owner, or from any person in lawful custody of them, by means of an offence or fraud."

By the Indian Contract (Amendment) Act, 1930, the section was repealed and the subject-matter of that section is now spread over the present sections 178 and 178-A of the Contract Act and section 30 of the Indian Sale of Goods Act. The new section 178 of the Contract Act states :

"Where a mercantile agent is, with the consent of the owner, in possession of goods or the documents of title to goods, any pledge made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorised by the owner of the goods to make the same ; provided that the pawnee acts in good faith and has not at the time of the pledge notice that the pawnor has not authority to pledge.

*Explanation.*—In this section the expressions 'mercantile agent' and 'documents of title' shall have the meanings assigned to them in the Indian Sale of Goods Act, 1930."

Section 30 of the Indian Sale of Goods Act provides as follows :

"30. (1) Where a person, having sold goods, continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of the previous sale shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

(2) Where a person, having bought or agreed to buy goods, obtains, with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods shall have effect as if such lien or right did not exist."

Section 178-A of the Contract Act states :

"178-A. When the pawnor has obtained possession of the goods pledged by him under a contract voidable under section 19 or section 19-A, but the contract has not been rescinded at the time of the pledge, the pawnee acquires a goods title to the goods, provided the acts in good faith and without notice of the pawnor's defect of title."

After the passing of the Indian Contract (Amendment) Act, 1930, the legal position with regard to the pledge of railway receipts is exactly the same in Indian law as it is in English law and consequently the owner of the goods cannot, pledge the goods represented by the railway receipts in the present case unless the railway authorities are notified of the transfer and they agree to hold the goods as bailee for the pledgee.

On behalf of the appellants Mr. Bhatt placed strong reliance upon the decision of *Official Assignee of Madras v. Mercantile Bank of India, Limited*<sup>1</sup>, in which it was held that a railway receipt, providing that delivery of the consigned goods is to be made upon the receipt being given up by the consignee or by a person whom he names by endorsement thereon, is a document of title within the meaning of the Indian Contract Act, 1872 (section 178 for which a new section was substituted by amending Act IV of 1930), a pledge of a railway receipt operated under the repealed section as a pledge of the goods. But this decision is not of much assistance to the appellants, because it was concerned with the interpretation and legal effect of section 178 of the Contract Act as it stood before the Indian Contract (Amending) Act (Amending Act IV of 1930). It was held by the Judicial Committee in that case that under the repealed section 178 the owner of the goods could obtain a loan on security of a pledge of the goods by the pledge of the documents of title. But it is significant to note that section 178 has been amended by the Amending Act, 1930 and under the present section statutory power to pledge goods or documents of title is expressly confined to mercantile agents while acting in the customary course of the business. There are two other instances in which a person other than the owner of the goods may make a valid pledge of the goods and these two instances are dealt with in section 178-A of the Contract Act and section 30 of the Indian Sale of Goods Act. The result, therefore, under the amended law is that a valid

1. (1934) L.R. 61 I.A. 416 : I.L.R. 58 Mad. 181 : 68 M.L.J. 26.

pledge can no longer be made by every person "in possession" of goods. It can only be made by a mercantile agent as provided in the new section 178 of the Contract Act or by a person who has obtained possession of the goods under a contract voidable under section 19 or section 19-A of the Contract Act as provided in section 178-A, or by a seller or by a buyer in possession of goods after sale as provided in section 30 of the Indian Sale of Goods Act. Learned Counsel for the appellants also referred to the decision of the Judicial Committee in *Ramdas Vithaldas Durbar v. S. Amerchand Co.*<sup>1</sup>, in which the Judicial Committee explained the legal effect of section 103 of the Contract Act, as it originally stood. It was held by Lord Parker that the railway receipts are instruments of title within the meaning of the Indian Contract Act, 1872, section 103, and that the sellers were therefore not entitled to stop the goods in transit except upon payment or tender to the pledgees of the advances made by them. It is manifest that the decision cannot afford assistance to the appellants, because, in the first place, it related to the construction of old section 103 of the Contract Act in regard to the right of stoppage of goods in transit, and, in the second place, there has been a significant change in the law in view of the legislative amendment of section 178 of the Contract Act by the Indian Contract (Amendment) Act, 1930.

In the present case, therefore, our concluded opinion is that there is no valid pledge of the consignments of menthol crystals represented by the railway receipts in favour of the plaintiff-bank and the finding of the High Court on this point is erroneous in law.

We shall next deal with the question whether the plaintiff can sue on the contract of bailment even though there is no valid pledge of the goods in favour of the plaintiff. It was contended on behalf of the appellants that the plaintiff-bank was the endorsee of railway receipts and, therefore, it was entitled to sue the defendants for compensation for the loss of the goods. We are unable to accept this argument as correct. At common law a bill of lading was not negotiable like a bill of exchange so as to enable the endorsee to maintain an action upon it in his own name, the effect of the endorsement being only to transfer the property in the goods but not the contract itself. It was observed by Alderson, B. in *Thompson v. Dominy*<sup>2</sup> as follows:

"This is another instance of the confusion, as Lord Ellenborough in *Hargreaves v. Cox* expresses it, which 'has arisen from similitudinous reasoning upon this subject'. Because, in *Luttrell v. Maitland* a bill of lading was held to be negotiable, it has been contended that that instrument transfers all the properties of a bill of exchange, but it would lead to absurdity to carry the doctrine to that length. The word 'negotiable' was not used in the sense in which it is used as applicable to a bill of exchange, but as passing the property in the goods only."

Delivery orders, warrants, written engagements to deliver goods and similar documents are in the same position as the bills of lading were before the Bills of Lading Act, 1855 (18 and 19 Vic. C. 111). They are mere promises by the seller, being the issuer or transferor, to deliver, or authorise the buyer to receive possession. It is only by reason of the enactment of the Bills of Lading Act, 1855 (18 and 19 Vic. c. 111) that the issue or transfer of a bill of lading operates as a delivery to the buyer of the goods shipped, and the consignee of the bill of lading is entitled to sue upon the contract contained in the same. The same provisions are contained in the Bills of Lading Act (Act IX of 1856) in India. It is true that the railway receipt and all other documents enumerated in section 2, sub-section (4), Sale of Goods Act, are assimilated to bills of lading for the purposes of the right of stoppage in transit under section 103, Contract Act and a pledge under section 178, Contract Act, as explained by the Judicial Committee in *Ramdas Vithaldas Durbar v. S. Amerchand & Co.*<sup>1</sup>, and *Official Assignee of Madras v. Mercantile Bank of India Ltd.*<sup>2</sup>. But the effect of these decisions is not to assimilate the railway receipt to a bill of lading for all purposes whatsoever. The legal position of the railway receipt is the same as it was in English law and that position is not affected at all by the enactment of section 2, sub-section (4) of the Sale of Goods Act, or the enactment of provi-

1 (1916) L.R. 43 I.A. 164 : 31 M.L.J. 541

2 133 E.R. 532, 534.

3 (1931) L.R. 61 I.A. 416 : 1 L.R. 58 M.L.J.

181 : 63 M.L.J. 26.

sions analogous to sections 103 and 178 of the Contract Act. As stated in Halsbury's Laws of England, Hailsham Edition, Volume 29, at page 143, Article 179 :

"Such documents, although they may purport to be, or may commonly be treated as, transferable, are not negotiable instruments, unless there be a trade usage to that effect. Accordingly, subject to the provisions of the Factors Act, 1889, the owner cannot claim delivery of the goods except from the seller who is the issuer or immediate transferor of the document."

It is manifest that there were no rights created merely by reason of the endorsement of a Railway Receipt between the endorsee and the railway company which has issued the railway receipt to the consignee, the only remedy of the endorsee being against the endorser. This was the position in English law, except in the case of bills of lading the transfer of which by the Law Merchant operated as a transfer of the possession of as well as the property in the goods, as observed by Lord Wright in *Official Assignee of Madras v. Mercantile Bank of India, Ltd.*<sup>1</sup>, at page 422. The endorsee may bring an action as an assignee of the contract of carriage but then the assignment has to be proved as in every other case. It is true that by reason of section 137 of the Transfer of Property Act, the provisions relating to the transfer of an actionable claim do not apply to a railway receipt, and the assignment need not be according to any particular form, but a railway receipt is not like a negotiable instrument. (See *Mercantile Bank of India, Ltd. v. Central Bank of India, Ltd.*<sup>2</sup>). It is also apparent that subject to the exceptions mentioned in sections 30 and 53 of the Indian Sale of Goods Act, 1930, and section 178 of the Contract Act, 1872, its possessor cannot give a better title to the goods than he has. The negotiation of the railway receipt may pass the property in the goods, but it does not transfer the contract contained in the receipt or the statutory contract under section 74-E of the Indian Railways Act. Negotiability is a creature of statute or mercantile usage, not of judicial decisions apart from either. So, in the absence of any usage of trade or any statutory provision to that effect, a railway receipt cannot be accorded the benefits which flow from negotiability under the Negotiable Instruments Act, so as to entitle the endorsee as the holder for the time being of the document of title to sue the carrier—the railway authorities in his own name. If the claim of the plaintiff is as an ordinary assignee of the contract of carriage, then the plaintiff has to prove the assignment in his favour. In the present case the plaintiff-bank has furnished no such proof of assignment in its favour. In view of clause (3) of the notice printed at the back of the railway receipt it is clear that an endorsement made on the face of the railway receipt by the consignee is meant to indicate the person to whom the consignee wishes delivery of the goods to be made if he himself does not attend to take delivery. An endorsement made by the consignee on the face of the railway receipt requesting the railway company to deliver the goods to the endorsee merely conveys to the railway company that the person in whose favour the endorsement is made by the consignee is constituted by him a person to whom he wishes that delivery of the goods should be made on his behalf. Clause (3) of the notice printed at the back of the railway receipt states ;

"That the railway receipt given by the railway company for the articles delivered for conveyance, must be given up at destination by the consignee to the railway company, otherwise the railway may refuse to deliver and that the signature of the consignee or his agent in the delivery book at destination shall be evidence of complete delivery."

If the consignee does not himself attend to take delivery he must endorse on the receipt a request for delivery to the person to whom he wishes it made, and if the receipt is not produced, the delivery of the goods may, at the discretion of the railway company, be withheld until the person entitled in its opinion to receive them has given an indemnity to the satisfaction of the railway company."

In the present case the plaintiff has not proved by proper evidence an assignment of the contract of carriage. In our opinion, the law on the point has been correctly stated by Bhagwati, J., in *Shamji Bhanji & Co. v. North Western Rly. Co.*<sup>3</sup>. It follows, therefore, that the plaintiff has no right to bring the present suit against the Union of India.

1. (1934) 61 I.A. 416 : I.L.R. 58 Mad. 181 : Mad. 360 : (1938) 1 M.L.J. 268.  
68 M.L.J. 26.  
2. (1937) 65 I.A. 75 at p. 91 : I.L.R. 1938 Bom. 169.  
3. (1945) 48 Bom. L.R. 698: A.I.R. 1947 Bom. 169.

Counsel for appellant has referred to the practice of merchants in treating a railway receipt as a symbol of goods and in making pledge of goods by pledge of railway receipts but no such practice or custom has been alleged or proved on behalf of the plaintiff in the present case. In the absence of such allegation or proof it is not open to the Court to take any judicial notice of any such practice. Counsel for appellant also referred to possible inconvenience and hardship to merchants if such a practice is not judicially recognised but the argument from inconvenience and hardship is a dangerous one and is only admissible in construction where the meaning of the statute is obscure. In *Sutters v. Briggs*<sup>1</sup> Lord Birkenhead stated

"The consequences of it is view of sect on 2 of the Gaming Act 1835 will no doubt be extremely inconvenient to many persons. But this is not a matter proper to influence the House or less in a doubtful case affording too bold for balanced speculation as to the probable intention of the Legislature

In the present case the language of section 178 of the Contract Act is clear and explicit and if any hardship and inconvenience is felt it is for Parliament to take appropriate steps to amend the law and not for the Courts to legislate under the guise of interpretation

For the reasons expressed we hold that Civil Appeal No. 474 of 1962 brought by the plaintiff bank should be dismissed and Civil Appeal No. 475 of 1962 brought by the Union of India through the General Manager Central Railway should be allowed with costs and the suit of the plaintiff bank should be dismissed with costs throughout

ORDER OF THE COURT—In accordance with the majority judgment Civil Appeal No. 474 of 1962 is allowed and Civil Appeal No. 475 of 1962 is dismissed and the plaintiff's suit is decreed with costs throughout

V K

C A No 474 of 1962 allowed  
C A No 475 of 1962 dismissed

## THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT—P. B. GAJENDRAGADKAR Chief Justice K. N. WANCHIOO  
J. C. SHAH S. M. SIKRI AND V. RAMASWAMI JJ

Kishanchand Lunidasing Bajaj

Appellant\*

Commissioner of Income tax, Bangalore

Respondent

*Income-tax Act (VI of 1922) sections 16 (2) and 18 (5)—Dividend income—Assessee Hindu undivided family owner of share—Karta thereof registered holder of the share—Income assessable as that of Hindu undivided family—Dividend income—Principle of grossing up—Nothing to do with accrual of income—Accrual to the real owner*

The assessee a Hindu undivided family consisting of the father and his seven sons owned shares that stood registered in the name of the father. The family commenced business in May 1956 and in the books of the firm the shares were credited as capital. In August 1962 two of the sons separated from the family received cash for their share. Then a partnership was formed between the father representing the joint family (having five-sevenths share) and the two divided sons (each having one-seventh share) for carrying on the business of the firm. Dividends received in respect of the shares were credited to the profit and loss account of the firm. In the proceedings of the firm for the assessment year 1959-60 the Revenue held that the assessee was the real and legal owner of the shares and that the shares were at no time the property of the firm. The Tribunal rejected the contention that the dividend from the shares could be assessed only in the hands of the person who held ownership legal as well as equitable in the shares, and as the family had ceased to be the equitable owner the Hindu undivided family could not be assessed under the Act on the dividend. The High Court answered the Reference against the assessee. With Special Leave the assessee appealed.

Held, that tax being charged by section 3 upon dividend income and not being excluded under section 4 (3), such income would be chargeable to tax under the Act in the hands of the person to whom it accrues or by whom it is received. A company for its purposes does not recognize any trust or equitable ownership in shares; it merely recognizes the registered shareholder as the owner and pays the dividend to that shareholder. But the shares, may, because of a trust or other fiduciary relationship, belong to a person other than the registered shareholder, and the dividend distributed by the company would for the purpose of tax be deemed to accrue or arise to the real owner of the shares.

Section 16 (2) is only a processing clause applicable in respect of dividend income. By virtue of the second part of section 16 (2) dividend may be grossed up only if the registered shareholder is the real owner of the shares. If the registered holder is not the real owner of the shares *i.e.*, he is the trustee or benamidar for the real owner, dividend income cannot be grossed up when including it in the total income of the real owner. But sub-section (2) of section 16 does not operate as an exemption from the pale of either section 3 or section 4 (1) of the Act; nor does it provide that liability to tax arises only when the person by whom dividend is received from the company is real owner of the shares. Section 18 (5) also does not lead to that result.

Therefore, when tax is paid on behalf of the shareholder and deduction is made from dividend, credit is given to him for the tax paid in his final assessment. But the scheme of grossing up is not susceptible of the interpretation that the income from dividend is to be regarded as the income only of the registered shareholder and not of the real owner of shares.

On facts, the contention cannot be accepted that because the dividend income in respect of the shares cannot be "grossed up" and credit for tax paid cannot be obtained by the assessee; the assessee is not liable to be taxed in respect of the dividend income received by them.

Appeal by Special Leave from the Judgment and Order dated the 19th July, 1963, of the Mysore High Court in I.T.R.C. No. 6 of 1963.

*K. Srinivasan and R. Gopalakrishnan*, Advocates, for Appellant.

*C.K. Daphtry*, Attorney-General for India, (*R. Ganapathy Iyer, R.H. Dhebar and R.N. Sachthey*, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

*Shah, J.*—Kishanchand Bajaj and his seven sons formed a Hindu undivided family, which owned shares exceeding Rs. 91,000 in value, in public limited companies. The family commenced business in money-lending and as commission agents on 16th May, 1956, in the name of M/s. Mangoomal Kishanchand and in the books of account of the firm the shares which stood registered in the name of Kishanchand with the companies were credited as capital of the business. On 22nd August, 1956, Shyam Sundar and Girdharlal, two of the sons of Kishanchand, separated from the family, each receiving rupees two lakhs in lieu of his share. On 23rd August, 1956, a partnership was formed between Kishanchand representing the Hindu undivided family of himself and his five sons and Shyam Sundar and Girdharlal, for carrying on the business of M/s. Mangoomal Kishanchand. Under the deed of partnership Shyam Sundar and Girdharlal were each entitled to a seventh share and the remaining five-sevenths share was to belong to Kishanchand as *karta* of the Hindu undivided family. Dividends received in respect of the shares were credited to the profit and loss account of the firm.

In proceedings for assessment of the firm for the year 1959-60 it was claimed that the shares which stood registered in the name of Kishanchand belonged not to the Hindu undivided family but to the firm of M/s. Mangoomal Kishanchand. The Income-tax Officer rejected that contention. He held that the Hindu undivided family was "the real and legal owner of the shares", and that the shares were at no time the property of the firm. The order of the Income-tax Officer was confirmed in appeal by the Appellate Assistant Commissioner. In second appeal to the Income-tax Appellate Tribunal, it was contended on behalf of the Hindu undivided family that the dividend from the shares could be assessed only in the hands of the person who held ownership "legal as well as equitable" in the shares, and as the family had ceased to be the "equitable owner" of the shares, the Hindu undivided family could not be assessed under the Income-tax Act, 1922 on the dividend. The Tribunal rejected the contention. The Tribunal then referred under section 66 (1) of the

Indian Income tax Act, 1922, the following question to the High Court of Mysore for opinion

"Whether on the facts and circumstances of the case the dividend income from shares stand as in the name of Kishanchand Lun dasingh Bajaj and acquired with the funds of the Hindu undivided family of which the said person was the *karta* was assessable in the hands of the assessee-family"

The High Court answered the question in the affirmative and with Special Leave the Hindu undivided family has appealed to this Court

In this appeal it was urged that where one taxable entity is the registered holder of shares in a company and the real owner of the shares is another taxable entity the registered shareholder alone is liable to be assessed to tax in respect of the dividend from those shares and therefore Kishanchand alone was liable to be taxed in respect of the dividend income from the shares, and not the Hindu undivided family. Reliance in support of this contention was placed upon section 16 (2) of the Indian Income-tax Act, 1922 and certain observations made by this Court in the judgment in *Howrah Trading Company Ltd v Commissioner of Income tax Central Calcutta*<sup>1</sup>

In our judgment the contention is wholly without substance. Under section 3, total income of the previous year of every individual, Hindu undivided family, company and local authority, and of every firm and other association of persons or the partners of the firm or the members of the association individually is charged to tax. By section 4 the total income of any previous year of any person includes, subject to the provisions of the Act, all income, profits and gains from whatever source derived, which are received or deemed to be received in the taxable territories in such year by or on behalf of such person, or if such person is resident in the taxable territories during such year the income which accrue or arise or is deemed to accrue or arise to him in the taxable territories during such year, or accrue or arise without the taxable territory during such year or having accrued or arisen to him without the taxable territories or brought in to the taxable territories during such year, or if such person is not residing in the taxable territories during such year, accrue or arise or are deemed to accrue or arise to him. By sub-section (3) of section 4 any income, profits or gains falling within the clauses (i) to (xxii) are not liable to be included in the total income of the person receiving them. Tax being charged by section 3 upon dividend income and not being excluded under section 4 (3), such income would be chargeable to income tax under the Act in the hands of the person to whom it accrues or by whom it is received. A company for its purposes does not recognize any trust or equitable ownership in shares. It merely recognizes the registered shareholder as the owner and pays the dividend to that shareholder. But the shares may, because of a trust or other fiduciary relationship belong to a person other than the registered shareholder, and the dividend distributed by the company would for the purpose of tax be deemed to accrue or arise to the real owner of the shares.

Section 16 of the Indian Income tax Act, 1922 deals with the exemptions and exclusions in determining the total income. The expression "total income" is defined in section 2 (15) it means

"total amount of income—profits and gains referred to in sub-section (1) of section 4 computed in the manner laid down in this Act"

Section 16 in so far as it is relevant provides

"(1) In computing the total income of an assessee—

(a) any sums exempted under the first proviso to sub-section (1) of section 7 the second and third provisos to section 8 sub-sections (2) (3) (4) and (5) of section 14 section 15 section 15-B and section 15-C shall be included and any sum exempted under section 15-A shall also be included except for the purpose of determining the rates at which income tax (but not super tax) is payable by the assessee to whom the exemption is given

(b) when the assessee is a partner of a firm, then whether the firm has made a profit or loss his share (whether a net profit or a net loss) shall be taken to be any salary interest commission or other remuneration payable to him by the firm in respect of the previous year increased or decreased respectively by his share in the balance of the profit or loss of the firm after the deduction

of any interest, salary, commission or other remuneration payable to any partner in respect of the previous year.

Provided \* \* \* \* \*

(c) all income arising to any person by virtue of a settlement or disposition whether revocable or not, and whether effected before or after the commencement of the Indian Income-tax (Amendment) Act, 1939 (VII of 1939), from assets remaining the property of the settlor or disponent, shall be deemed to be income of the settlor or disponent, and all income arising to any person by virtue of a revocable transfer of assets shall be deemed to be income of the transferor :

Provided \* \* \* \* \*

(2) For the purposes of inclusion in the total income of an assessee any dividend shall be deemed to be income of the previous year in which it is paid, credited or distributed or deemed to have been paid, credited or distributed to him, and shall be increased to such amount as would, if income-tax (but not super-tax) at the rate applicable to the total income of the company (without taking into account any rebate allowed or additional income-tax charged) for the financial year in which the dividend is paid, credited or distributed, or deemed to have been paid, credited or distributed, were deducted therefrom, be equal to the amount of the dividend :

Provided \* \* \* \* \*

(3) In computing the total income of any individual for the purpose of assessment, there shall be included—

(a) so much of the income of a wife or minor child of such individual as arises directly or indirectly—

(i) from the membership of the wife in a firm of which her husband is a partner ;

(ii) from the admission of the minor to the benefits of partnership in a firm of which such individual is a partner ;

(iii) from assets transferred directly or indirectly to the wife by the husband otherwise than for adequate consideration or in connection with an agreement to live apart ; or

(iv) from assets transferred directly or indirectly to the minor child, not being a married daughter, by such individual otherwise than for adequate consideration ; and

(b) so much of the income of any person or association of persons as arises from assets transferred otherwise than for adequate consideration to the person or association by such individual for the benefit of his wife or a minor child or both."

Under the Income-tax Act, 1922, certain items of income are exempt from liability to tax and do not enter into the computation of total income : there are other items of income, which though exempt from tax are liable to be included in the total income of the assessee for determining the rate applicable. Sub-sections (1) and (3) of section 16 provide that certain income which does not accrue or arise to the assessee or which is not received as income by him is deemed to be part of his total income. These sub-sections deal with inclusion of the specified classes of income in the computation of total income. The only difference between the two clauses is that sub-section (1) applies to all assessees, whereas sub-section (3) applies to individuals only. But sub-section (2) does not direct the inclusion of any item of income in the computation of the total income of an assessee to whom it does not accrue or arise : it is only a processing clause applicable in respect of dividend income. In terms it provides that for the purpose of inclusion of dividend in the total income of an assessee, dividend shall be deemed to be income of the previous year in which it is paid, credited or distributed, or deemed to be paid, credited or distributed, and further that the dividend shall be increased, or as it is sometimes called "grossed up" by adding thereto the income-tax deemed to have been paid by the company on behalf of the shareholder. The sub-section in the first instance designates the year in which the dividend income is to be included in the total income. Therefore dividend will be included in the income of the assessee in the year in which it is paid, credited or distributed, or be deemed to be paid, credited or distributed. Since the same income cannot be taxed twice over, dividend income will be taxed in the hands of the real owner of the shares and in the year designated by section 16 (2). But by virtue of the second part of section 16 (2), dividend may be grossed up only if the registered shareholder is the real owner of the shares. If the registered holder is not the real owner of the shares, i.e., he is a trustee or *benamidar* for the real owner, dividend income cannot be grossed up when including it in the total income of the real owner. But sub-section (2) of section 16 does not operate as an exemption



from the pale of either section 3 or section 4 (1) of the Act nor does it provide that liability to tax arises only when the person by whom dividend is received from the company is the real owner of the shares. Sub-section (5) of section 18 also does not lead to that result. The clause provides that deduction made by a company and paid to the account of the Central Government in accordance with the provisions of section 18 and any sum by which a dividend has been increased under sub-section (2) of section 16 shall be treated as payment of income tax or super tax on behalf of the person from whose income the deduction was made and credit shall be given to him therefor. In so far as it deals with dividend which is "grossed up", sub-section (5) of section 18 forms a corollary to section 16 (2). Therefore when tax is paid on behalf of a shareholder and deduction is made from dividend, credit is given to him for the tax paid in his final assessment. But the scheme of "grossing up" is not susceptible of the interpretation that the income from dividend is to be regarded as the income only of the registered shareholder and not of the real owner of share.

The authorities of this Court which have interpreted section 16 (2) may be reviewed. In *Howrah Trading Company's case*<sup>1</sup> it was held that a person who had purchased shares in a company under a blank transfer and in whose name the shares had not been registered in the books of the company is not a "shareholder" in respect of such shares within the meaning of section 18 (5) of the Income tax Act, notwithstanding his equitable right to receive dividend on such shares. Such a person was therefore held not entitled to have this dividend income grossed up under section 16 (2) of the Act by the addition of the income tax paid by the company in respect of those shares, and to claim credit for the tax deducted at source under section 18 (5) of the Act. In that case the only dispute which arose was with regard to "grossing up". The dividend income was included in the total income of the person who was the real owner of the shares, though the shares were not registered in his name. In *Income tax Officer, North Satara v Arund N Mafailal & others*<sup>2</sup>, it was held, following the judgment in *Howrah Trading Company's case*<sup>1</sup>, that the registered shareholder alone is entitled to the benefit of the credit for tax paid by the company under section 18 (5) and the corresponding "grossing up" under section 16 (2). In that case shares belonging to a firm registered under the Income tax Act were held in the names of three partners of the firm. The Income tax Officer sought to treat the dividend from the shares as income of the firm and to "gross up" the dividend by adding the income tax paid. This Court held that the only persons who were entitled to be treated as shareholders to whom the provisions of sections 16 (2) and 18 (5) were attracted were the three partners. The judgment of this Court in *Commissioner of Income tax, Bombay City II v Shakuntala and others*<sup>3</sup>, does not support any different rule. That was a case in which a Hindu undivided family held certain shares in a company in the names of different members of the family. The Income-tax Officer applied the provisions of section 23 A of the Indian Income tax Act, 1922, before it was amended in 1955 and ordered that the undistributed portion of the distributable income of the company shall be deemed to be distributed. In proceedings for assessment the amount of deemed income appropriate to the shares of the family was ordered by the Income tax Officer to be included in the income of the family. It was held that the expression "shareholder" in section 23 A of the Indian Income tax Act meant the shareholder registered in the books of the company. Therefore the amount appropriate to the shares had to be included in the income of the members of the family in whose names the shares stood in the register of the company, and as the Hindu undivided family was not a registered shareholder of the company, the amount deemed to be distributed could not be assessed as the income of the family under section 23 A. The Court in *Shakuntala's case*<sup>3</sup>, was dealing with notional income. The amounts which were not distributed by the company, but which by virtue of an order under section 23 A of the Act were deemed

1 (1959) S.C.J. 1133 (1959) 2 S.C.R. (Supp.) 448 3 (1962) 1 S.C.R. 788 (1961) 43 I.T.R. 352.  
2 (1963) 1 S.C.J. 625.

to be distributed were sought to be assessed and the Court held in the light of the express provisions of section 23-A that the undistributed portion of the distributable income of the company of the previous year as computed for income-tax purposes shall be deemed to be distributed as dividend among the shareholders. The decision of the Court was that for the purpose of section 23-A, the expression "shareholder" meant only the registered shareholder and not an equitable owner. The decision has no bearing on the true interpretation of section 16 (2).

Reliance was placed by Counsel for the appellant on the following observations made by Hidayatullah, J., in delivering the judgment of this Court in *Howrah Trading Company's case*<sup>1</sup>:

"The words of section 18 (5) must accordingly be read in the light in which the word 'shareholder' has been used in the subsequent sections, and read in that manner, the present assessee notwithstanding the equitable right to the dividend, was not entitled to be regarded as a 'shareholder' for the purpose of section 18 (5) of the Act. That benefit can only go to the person who, both in law and in equity, is to be regarded as the owner of the shares and between whom and the company exists the bond of membership and ownership of a share in the share capital of the company."

It was said by Counsel for the appellants that by the use of the expression "benefit can only go to the person who, both in law and in equity, is to be regarded as the owner of the shares", it was laid down that dividend may be taxed only in the hands of a person who is "in law as well as in equity" the shareholder. But these observations are not susceptible of any such meaning. Hidayatullah, J., in that case was seeking to explain that dividend income cannot be "grossed up" in the hands of the real owner of shares if the shares are registered in the name of another person. He did not say that the real owner of shares cannot be taxed in respect of dividend received by him, if the shares are registered in the name of another person.

We are unable to accept the argument of Counsel for the appellants that because the dividend income in respect of the shares cannot be "grossed up", and credit for tax paid cannot be obtained by the appellants, the appellants are not liable to be taxed in respect of dividend received by them. There is no provision in the Act which supports this plea, and the scheme of the Act lends no countenance to an expedient which may lead to gross evasion of tax.

The appeal therefore fails and is dismissed with costs.

V.S.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, M. HIDAYATULLAH, J. C. SHAH AND S. M. STKRI, JJ.

Mirza Ali Akbar Kashani

.. *Appellant\**

v.

The United Arab Republic and another

.. *Respondents.*

*Civil Procedure Code (V of 1908), section 86 (1)—Applicability—Suit against foreign State with republican form of Government—Consent of Central Government—Essential—International Law—Foreign State—Immunity from being sued in Municipal Courts.*

In view of the definition of "Ruler" described by section 87-A (1) (b) of the Code of Civil Procedure it is difficult to accept the argument that the expression "Ruler of a foreign State" under section 86 (1) can take in cases only of Rulers of foreign States which are governed by a monarchical form of Government. It refers to Rulers of all foreign States whatever be their form of Government. The head of a Republican State as in the instant case the United Arab Republic is the Ruler of that State and a suit against the Ruler in the Municipal Courts without the consent of the Central Government is not sustainable.

1. (1959) S.C.J. 1133 : (1959) 2 S.C.R. (Supp.) 448.

\* C.A. No. 220 of 1964.

5th August, 1965.

The effect of section 86 (1) is that it makes a statutory provision covering a field which would otherwise be covered by the doctrine of immunity under International Law.

Appeal from the Judgment and Order dated 17th April, 1961 of the Calcutta High Court in Appeal from Original Order No. 115 of 1960.

*R. Gnowdhury*, Senior Advocate, (*S. Mookherjee* and *S. N. Mukerji*, Advocates, with him), for Appellant.

*B. Sen*, Senior Advocate, (*V. A. Seyid Muhammad*, *P. K. Das* and *P. K. Bose*, Advocates, with him), for Respondents.

The Judgment of the Court was delivered by

*Gajendraadkar, C.J.* —This appeal arises out of a suit filed by the appellant, Mirza Ali Akbar Kashani, against the two respondents, the United Arab Republic, and the Ministry of Economy, Supplies, Importation Department of the Republic of Egypt at Cairo, on the Original Side of the Calcutta High Court. By his plaint, the appellant claimed to recover from the respondents damages assessed at Rs. 6,07,346 for breach of contract. According to the appellant the contract in question was made between the parties on 27th March, 1958. Respondent No. 2 which was a party to the contract had agreed to buy tea from the appellant upon certain terms and conditions; one of these was that respondent No. 2 would not place any further orders in India for purchase of tea with anyone else during the tenure of the contract and that it would, in every case, give the appellant the benefit of the first refusal for respondent No. 2's additional requirements. The appellant alleged that during the tenure of the contract, the respondents had wrongfully placed an order for the supply of tea with a third party without giving the appellant a chance to comply with the said requirement. That is how the respondents had committed a breach of a material term of the contract.

Formerly, the Republic of Egypt and the Republic of Syria were two independent sovereign States. They, however, merged and formed a new Sovereign State on 22nd February, 1958. This new sovereign State is known as the United Arab Republic and is referred as respondent No. 1 in the present appeal. This new State has been recognised by the Government of India. Respondent No. 2 has been working as a department of respondent No. 1 and is a part and parcel thereof. The present suit was instituted on 10th August, 1959. It is common ground that the appellant did not obtain the consent of the Central Government to the institution of the suit under section 86 of the Code of Civil Procedure. The appellant, however, applied for leave under clause 12 of the Letters Patent in view of the fact that a part of the cause of action had arisen within the jurisdiction of the Calcutta High Court. This leave was granted to the appellant by the learned trial Judge.

On 3rd December, 1959, the respondents entered appearance in the suit; and on 17th December, 1959, they applied for an order that the leave granted under Clause 12 of the Letters Patent should be revoked, the plaint should be rejected and further proceedings in the suit should be stayed. According to the respondent, the trial Court had no jurisdiction to entertain the suit inasmuch as the President of the United Arab Republic was its Ruler and the suit was, in reality, and in substance, a suit against him and as such, it was barred under section 86 of the Code. It was further averred on their behalf that no part of the alleged cause of action had arisen within the jurisdiction of the Court; and so, leave could not be granted under Clause 12. At the hearing of this petition, the respondents were allowed to urge an additional ground in support of their plea that the leave should be revoked; they urged that respondent No. 1 was a foreign sovereign State and as such, it enjoyed absolute immunity from being sued in the trial Court under the Rules of International Law as adopted and applied by the municipal law of India.

These pleas were controverted by the appellant. It was urged that section 86 of the Code was not a bar to the present suit, as the said section created a bar only against a Ruler of a foreign State and the present suit clearly did not fall in that

category. According to the appellant, the immunity from being sued without the sanction of the Central Government to which section 86 of the Code referred could not be invoked by a foreign State such as respondent No. 1. The appellant also urged that in view of the fact that the transaction which has given rise to the present suit has nothing to do with the governmental functions of respondent No. 1, no immunity could be claimed by the respondents under the doctrine of International Law. The appellant further contended that by appearing in the present proceedings and by filing pleas thereafter, the respondents had submitted to the jurisdiction of the Court and had waived their objection to its jurisdiction.

The learned trial Judge held that section 86 did not bar the present suit. He accepted the contention of the appellant that that bar could be invoked only against the Ruler of a foreign State and not against respondent No. 1 which was an independent sovereign State. On the question of the plea raised by the respondents under International Law, the trial Judge held that having regard to the nature of the transaction which has given rise to the present suit, the plea of immunity raised by the respondents cannot be sustained. He also found against the respondents on the question of waiver. In the result, the application made by the respondents for revoking leave was dismissed by the trial Judge.

The respondents then took the matter before the Court of Appeal of the Calcutta High Court under the Letters Patent. Both the learned Judges who constituted the Court of Appeal have upheld the finding of the trial Judge that section 86 of the Code does not create a bar against the present suit. They have, however, reversed the trial Judge's conclusions on the question of immunity claimed by the respondents under International Law as well as on the question of waiver. They have held that it was not shown that the application made by the respondents challenging the jurisdiction of the trial Judge to entertain the suit could be reasonably construed as submission to the jurisdiction of the Court by them; and they have come to the conclusion that the doctrine of International Law which recognises the absolute immunity of sovereign independent States from being sued in foreign Courts created a bar against the present suit. In the result, the appeal preferred by the respondents has been allowed, the order passed by the trial Judge has been set aside, and the plaint filed by the appellant has been rejected under prayer (b) of the Master's Summons. The appellant has applied for and obtained a certificate from the Court of Appeal and it is with the said certificate that he has come to this Court in appeal.

Mr. R. Chaudhry for the appellant has contended that the view taken by the Court of Appeal about the scope and effect of the doctrine of immunity on which the respondents relied is erroneous in law. In support of his argument, he has urged that the trend of recent decisions and the tendency of the development of International Law in recent times indicate that the doctrine of immunity in question can no longer be regarded as an absolute and unqualified doctrine. He suggests that in modern times, States enter into commercial transactions and it would be inappropriate to allow such commercial transactions the protection of the doctrine of immunity of sovereign States from being sued in foreign countries. In support of his argument, Mr. Chaudhry has very strongly relied on the observations made by H. Lauterpacht who has edited the Eighth edition of Oppenheim's International Law. Says Editor Lauterpacht:

"The grant of immunity from suit amounts in effect to a denial of a legal remedy in respect of what may be a valid legal claim; as such, immunity is open to objection. The latter circumstance provides some explanation of the challenge to which it has been increasingly exposed—in addition to the circumstance that the vast expansion of activities of the modern State in the economic sphere has tended to render unworkable a rule which grants to the State operating as a trader a privileged position as compared with private traders. Most States, including the United States, have now abandoned or are in the process of abandoning the rule of absolute immunity of foreign States with regard to what is usually described as acts of a private law nature. The position in this respect in Great Britain must be regarded as fluid" (page 273).

Even Dicey in his "Conflict of Laws" while enunciating rule 17 in relation to such immunity in unqualified form, has made some comment to which Mr. Chaudhry has invited our attention. It is true that rule 17 says, *inter alia*, that

the Court has no jurisdiction to entertain an action or other proceeding against any foreign State, or the head or Government or any department of the Government of any foreign State. Commenting on this rule, the learned author observes that:

"the immunity is derived ultimately from the rules of Public International Law and from the maxim of that law, *par in parem non habet imperium*. The relevant rule of Public International Law has become part of English law. It is not impossible, however, that English law goes further than the international legal system demands in this regard."

Then the learned author subjects the English decisions to a close analysis and concludes that it may well be that the system of international law as a whole is moving towards a "functional" concept of jurisdictional immunities which would confine their scope to matters within the field of activity conceived as belonging essentially to a person of that system of whatsover category<sup>1</sup>. Mr. Chaudhry naturally lays emphasis on these observations of Dicey. He has conceded that the general consensus of opinion as disclosed in the English decisions bearing on the point is not in his favour, though the voice of dissent raised by Lord Denning in *Rahimtollav. Nizam of Hyderabad*<sup>2</sup>, distinctly supports Mr Chaudhry's plea. That, in substance, is how Mr. Chaudhry has attempted to present his case on the interesting question about the immunity of sovereign States under International Law.

Whilst we were hearing Mr Chaudhry on this point, we enquired from him whether he supported the finding of the Courts below that the present suit was not barred under section 86 of the Code, and he contended that his case was that that finding was clearly right and the present appeal would have to be dealt with on the footing that section 86 created no difficulty against the appellant. Mr. Chaudhry did not dispute the correctness of the finding recorded by the Court of Appeal on the question of waiver.

Mr. B Sen who appeared for the respondents, however, urged that he wanted to challenge the correctness of the finding recorded by the Calcutta High Court as to the applicability of section 86 of the Code. He conceded that the trial Judge as well as the two learned Judges who heard the Letters Patent Appeal had agreed in holding that section 86 was not a bar against the present suit; but Mr. Sen's argument was that the said finding was plainly inconsistent with the true scope and effect of section 86. He also urged that the view taken by the Court of Appeal as to the applicability of the doctrine of immunity under International Law was right.

During the course of the hearing of this appeal, it thus became clear that two questions fall to be considered by us; the first is in relation to the application of section 86 of the Code; and the second in regard to the scope and effect of the doctrine of immunity under International Law. Logically, the effect of section 86 has to be considered first, because it is common ground that if we were to hold that section 86 was a bar to the present suit, then the interesting point about immunity under International Law may not have to be considered. The appeal would, in that view, be liable to be dismissed on the ground that the suit was barred by section 86. After hearing both Mr. Chaudhry and Mr. Sen, we have come to the conclusion that the learned Judges of the Calcutta High Court were, with respect, in error in holding that section 86 does not create a bar against the present suit. That being our view, we do not propose to consider whether the Court of Appeal was right in upholding the respondents' plea of absolute immunity under International Law. Let us, therefore, deal with the problem raised under section 86 of the Code.

The relevant provisions are to be found in sections 83—87.B of the Code. The heading of these provisions is "*Suits by aliens and by or against foreign Rulers, Ambassadors and Envoys*". The present sections have been introduced by section 12 of the Code of Civil Procedure (Amendment) Act, 1951 (11 of 1951). Prior to the amendment, the relevant sections were sections 83—87. As a result of the amendment,

cases of the Rulers of former Indian States are now dealt with by section 87-B, and the remaining provisions deal with foreign States and Rulers of foreign States. It is a matter of history that the Rulers of Indian States who could claim the benefit of the provisions contained in sections 84 and 86 under the Code of 1908 have ceased to be Rulers and are now entitled to be described as Rulers of former Indian States. That is why a specific and separate provision has been made in regard to Rulers of former Indian States by section 87-B. That, broadly stated, is the main distinction between the schemes of earlier sections 83—87 and the present sections 83—87-B.

The learned Judges of the Calcutta High Court who have repelled the respondents' contention that the present suit is barred under section 86 of the Code, appear to have taken the view that section 86 (1) refers to Ruler of a foreign State and not to a foreign State as such. We will presently cite the relevant sections and construe them; but, for the present, we are indicating the main ground on which the decision of the learned Judges is founded. Section 86 (1) says that no Ruler may be sued except with the consent of the Central Government; and the learned Judges thought that a Ruler must be distinguished as from a State and section 86 (1) cannot be extended to a case of the State. The reference to a Ruler made by section 86 (1) was contrasted with the reference to a foreign State made by section 84; and this contrast was pressed into service in support of the conclusion that section 86 cannot be invoked against a foreign State. Similarly, section 86 (3) grants exemption to a Ruler from arrest except with the consent of the Central Government. A similar argument is based on this provision to take the case of a foreign State outside the purview of section 86. Likewise, section 85 refers to a Ruler while authorising the Central Government to appoint any person to act on behalf of such Ruler, and it is said that this provision also brings out the fact that the Ruler of a foreign State is treated as apart from the State itself.

It appears from the judgments of the learned Judges that they were prepared to concede that in regard to a State which is governed by a monarchical form of Government, it would not be permissible to make a distinction between the State as such and its Ruler, and so, it was thought that in regard to a monarchical State, section 86 may conceivably apply, though the words used in section 86 (1) do not, in terms, refer to a State. On this view, the Court of Appeal naturally considered the question about the immunity of the respondents under the provisions of International Law. The point which arises for our decision thus lies within a narrow compass; was the Calcutta High Court right in holding that the present suit does not fall under the purview of section 86 (1)? It is clear that if the answer to this question is in the negative, the suit would be bad because it has been filed without the consent of the Central Government.

The decision of this question depends primarily on the construction of section 86 (1) itself; but before construing the said section, it is necessary to examine section 84. The present section 84 reads thus:—

“A foreign State may sue in any competent Court:

Provided that the object of the suit is to enforce a private right vested in the Ruler of such State or in any officer of such State in his public capacity.”

The predecessor of this section in the Code of 1882 was section 431; it read thus:—

“A foreign State may sue in the Courts of British India, provided that—

(a) it has been recognised by Her Majesty or the Governor-General in Council, and

(b) the object of the suit is to enforce the private rights of the head or of the subjects of the foreign State.

The Court shall take judicial notice of the fact that foreign State has not been recognised by Her Majesty or by the Governor-General in Council.”

In 1908, section 84 (1) took the place of section 431. In enacting this section, an amendment was made in the structure of the section and two provisos were added to it. We will presently refer to the purpose which was intended to be served by the second proviso.

It is plain that section 84 empowers a foreign State to sue. In other words it confers a right on the foreign State to bring a suit whereas section 86 imposes a liability or obligation on the Ruler of a foreign State to be sued with the consent of the Central Government. It is remarkable that though the heading of these sections does not in terms refer to foreign States at all, section 84, in terms empowers a foreign State to bring a suit in a competent Court. It is true that too much emphasis cannot be placed on the significance of the heading of the sections, but, on the other hand its relevance cannot be disputed, and so, it seems to us that the Legislature did not think that the case of a foreign State would not be included under the heading of this group of sections.

In this connection it is necessary to bear in mind that even when the Ruler of a State sues or is sued the suit has to be in the name of the State, that is the effect of the provision of section 87, so that it may be legitimate to infer that the effect of reading sections 84, 86 and 87 together is that a suit would be in the name of the State, whether it is a suit filed by a foreign State under section 84, or is a suit against the Ruler of a foreign State under section 86. As a matter of procedure, it would not be permissible to draw a sharp distinction between the Ruler of a foreign State and a foreign State of whom he is the Ruler. For the purpose of procedure in every case the suit has to be in the name of a State. That is another factor which cannot be ignored.

Then in regard to the scope of the suit which may be filed by a foreign State under section 84 the proviso makes it clear that the suit which can be filed by a foreign State must be to enforce a private right vested in the Ruler of such State or in any officer of such State in his public capacity. It will be recalled that section 431 (b) of the Code of 1882 has provided that the object of the suit which could be filed under section 431 should be to enforce the private rights of the head or of the subjects of the foreign State. It appears that this clause gave rise to some doubt as to whether a suit could be brought by a foreign State in respect of the private rights of the subjects of that State, and in order to remove the said doubt, the Code of 1908 inserted the second proviso to section 84 (1) which took the place of section 431 of the Code of 1882. This proviso made it clear that the object of litigation by a foreign State cannot be to enforce the right vesting in a subject as such as a private subject, it must be the enforcement of a private right vested in the head of a State or in any officer of such State in his public capacity. In other words the suit which can be filed under section 84 and which could have been filed under section 431 of the Code of 1882, must relate to a private right vested in the head of the State or of the subjects meaning some public officers of the said State. The private right properly so-called of an individual as distinguished from the private right of the State, was never intended to be the subject matter of a suit by a foreign State under the Code of Civil Procedure at any stage.

That takes us to the question as to what is the true meaning of the words "private rights". In interpreting the words "private rights" it is necessary to bear in mind the fact that the suit is by a foreign State, and the private rights of the State must in the context, be distinguished from political rights. The contrast is not between private rights or individual rights as opposed to those of the body politic, the contrast is between private rights of the State as distinguished from its political or territorial rights. It is plain that all rights claimed by a foreign State which are political and territorial in character can be settled under International Law by agreement between one State and another. They cannot be the subject matter of a suit in the municipal Courts of a foreign State. Thus, the private right to which the proviso refers is on the ultimate analysis, the right vesting in the State, it may vest in the Ruler of a State or in any officer of such state in his public capacity, but is a right which really and in substance vests in the State. It is in respect of such a right that a foreign State is authorised to bring a suit under section 84.

In *Hujon Manick v. Bur Singh*<sup>1</sup>, a Division Bench of the Calcutta High Court had occasion to consider the denotation of the words "private rights" spoken of in section 431, clause (b) of the Code of Civil Procedure, 1882, and it was held that the said words do not mean individual rights as opposed to those of the body politic or State, but those private rights of the State which must be enforced in a Court of Justice, as distinguished from its political or territorial rights, which must, from their very nature, be made the subject of arrangement between one State and another. They are rights which may be enforced by a foreign State against private individuals as distinguished from rights which one State in its political capacity may have as against another State in its political capacity.

That takes us to section 86. Section 86 (1) with which we are directly concerned reads thus :—

"No Ruler of a foreign State may be sued in any Court otherwise competent to try the suit except with the consent of the Central Government certified in writing by a Secretary to that Government."

There is a proviso to this section with which we are not concerned in the present appeal. Section 86 (2) deals with the question of consent which the Central Government is authorised to give, and it lays down how the consent can be given and also provides for cases in which such consent shall not be given. Section 86 (3) refers to the question of arrest and provides that no Ruler of a foreign State shall be arrested except with the consent of the Central Government and no decree shall be executed against the property of any such Ruler. Section 86 (4) extends the preceding provisions of section 86 to the three categories of Officers specified in clauses (a), (b) and (c).

Section 86 (1) as it stood prior to the amendment of 1951, read thus :—

"Any such Prince or Chief, and any Ambassador or Envoy of a foreign State, may, with the consent of the Central Government, certified by the signature of a Secretary to that Government but not without such consent, be sued in any competent Court."

So far as the other provisions are concerned, there does not appear to be any material change made by the Amending Act. The form of the section and its structure have however been altered.

Then follows section 87 to which we have already referred. This section provides that the Ruler of a foreign State may sue, and shall be sued, in the name of his State. This provision of the present section is substantially the same as in section 87 which occurred in the Code of 1908. The said section provided that a Sovereign Prince or Ruling Chief may sue, and shall be sued, in the name of his State. This provision naturally conforms to section 86 (1) as it then stood.

Section 87-A (1) which has been added for the first time by the Amending Act of 1951, prescribes the definitions of "foreign State" and "Ruler." Section 87-A (1) (a) provides that in this Part, "foreign State" means any State outside India which has been recognised by the Central Government; and (b) "Ruler," in relation to a foreign State, means the person who is for the time being recognised by the Central Government to be the head of that State.

Reverting then to section 86, there can be no difficulty in holding that when section 86 (1) refers to a Ruler of a foreign State, it refers to the Ruler in relation to the said State, and means the person who is for the time being recognised by the Central Government to be the head of that State. In view of the definition prescribed by section 87-A (1) (b), it seems difficult to accept the argument that the expression "the Ruler of a foreign State" under section 86 (1) can take in cases only of Rulers of foreign States which are governed by a monarchical form of Government. In view of the definition of a foreign Ruler, it is plain that when section 86 (1) refers to Rulers of foreign States, it refers to Rulers of all foreign States whatever be their form of Government. If the form of Government prevailing in a foreign State is Republican, then the Ruler of the said State would be the person



who is recognised for the time being by the Central Government to be the head of that State. In other words, the definition of a Ruler clearly and unambiguously shows that whoever is recognised as the head of a foreign State would fall within the description of Ruler of a foreign State under section 86. That being so, we do not think in reading section 86 (1), it would be permissible to import any terms of limitation, and unless some terms of limitation are imported in construing section 86 (1), the argument that the head of a Republican State is not a Ruler of that State cannot be upheld.

Besides on principle, it is not easy to understand why it should be assumed that the Code of Civil Procedure always made a distinction between Rulers of foreign States governed by monarchical form of Government and those which were governed by Republican form of Government. Both forms of Government have been in existence for many years past, and the Legislature which framed the relevant provisions of the Code was aware that there are several States in which monarchical form of Government does not prevail. Could it have been the intention of the framers of the Code of Civil Procedure that monarchical States should be liable to be sued under section 86 (1) subject to the consent of the Central Government, in the municipal Courts of India, whereas foreign States not so governed should fall outside section 86 (1) and thus be able to claim the immunity under International Law? In our opinion, no valid ground has been suggested why this question should be answered in the affirmative.

There is one more circumstance to which we may refer in this connection. We have already noticed that while amending the provisions, the Amending Act of 1951 has dealt with the question of Rulers of former Indian States separately under section 87 B, and having made some formal and some substantial changes in the rest of the provisions the Legislature has introduced section 87 A which is a definition section. At the time when section 87 A (1) (b) defined 'Ruler,' it must have been plain to the Legislature that this definition would take in all heads of foreign States whatever the form of Government prevailing in them may be, and so, it would not be unreasonable to hold that the object of the definition was to make it clear that Rulers of foreign States to which section 86 (1) applied would cover Rulers of all foreign States, provided they satisfied the requirements of the definition of section 87 A (1) (b).

Incidentally, the construction which we are inclined to place on section 86 (1) is harmonious with the scheme of the Code on this point. Section 84 authorises a foreign State to sue in respect of the rights to which its proviso refers. Having conferred the said right on foreign States section 86 (1) proceeds to prescribe a limited liability against foreign States. The limitation on the liability of foreign States to be sued is two-fold. The first limitation is that such a suit cannot be instituted except with the consent of the Central Government certified in writing by a Secretary to that Government. This requirement shows the anxiety of the Legislature to save foreign States from frivolous or unjustified claims. The second limitation is that the Central Government shall not give consent unless it appears to the Central Government that the case falls under one or the other of clauses (a) to (d) of section 86 (2). In other words the Legislature has given sufficient guidance to the Central Government to enable the said Government to decide the question as to when consent should be given to a suit being filed against the Ruler of a foreign State. Having provided for this limited liability to be sued, the Legislature has taken care to save the Ruler of a foreign State from arrest, except with the consent of the Central Government similarly certified and has directed that no decree shall be executed against the property of any such Ruler, that is the effect of section 86 (3).

It is true that this provision exempts the property of any such Ruler from execution of any decree that may be passed against a Ruler, and apparently, the High Court thought that this tends to show that the Ruler of a foreign State within the contemplation of section 86 (1) must be the Ruler himself and not the State. In our opinion, this view is not well founded. The provision that a decree

passed against the Ruler of a foreign State shall not be executed against the property of such Ruler, rather tends to show that what is exempted is the separate property of the Ruler himself and not the property of the Ruler as head of the State. A distinction is made between the property belonging to the State of which the Ruler is recognised to be the head, and the property belonging to the Ruler individually. We are, therefore, satisfied that section 86 (1) applies to cases where suits are brought against Rulers of foreign States and that foreign States fall within its scope whatever be their form of Government. We have already indicated that whenever a suit is intended to be brought by or against the Ruler of a foreign State, it has to be in the name of the State, and that is how the present suit has, in fact, been filed.

The effect of the provisions of section 86 (1) appears to be that it makes a statutory provision covering a field which would otherwise be covered by the doctrine of immunity under International Law. It is not disputed that every sovereign State is competent to make its own laws in relation to the rights and liabilities of foreign States to be sued within its own municipal Courts. Just as an independent Sovereign State may statutorily provide for its own rights and liabilities to sue and be sued, so can it provide for the rights and liabilities of foreign States to sue and be sued in its municipal Courts. That being so, it would be legitimate to hold that the effect of section 86 (1) is to modify to a certain extent the doctrine of immunity recognised by International Law. This section provides that foreign States can be sued within the municipal Courts of India with the consent of the Central Government and when such consent is granted as required by section 86 (1), it would not be open to a foreign State to rely on the doctrine of immunity under International Law, because the municipal Courts in India would be bound by the statutory provisions, such as those contained in the Code of Civil Procedure. In substance, section 86 (1) is not merely procedural; it is in a sense a counter-part of section 84. Whereas section 84 confers a right on a foreign State to sue, section 86 (1) in substance imposes a liability on foreign States to be sued, though this liability is circumscribed and safeguarded by the limitations prescribed by it. That is the effect of section 86 (1).

In *Chandulal Khushalji v. Awad Bin Umar Sultan Nawaz Jung Bahadur*<sup>1</sup>, Strachey, J., had occasion to consider this aspect of the matter in relation to the provisions of section 433 of the Code of 1882. What section 433 does, said the learned Judge,

"is to create a personal privilege for sovereign princes and ruling chiefs and their ambassadors and envoys. It is a modified form of the absolute privilege enjoyed by independent sovereigns and their ambassadors in the Courts in England, in accordance with the principles of International Law. The difference is that while in England the privilege is unconditional, dependent only on the will of the sovereign or his representative, in India it is dependent upon the consent of the Governor-General in Council, which can be given only under specified conditions. This modified or conditional privilege is, however, based upon essentially the same principle as the absolute privilege, the dignity and independence of the ruler, which would be endangered by allowing any person to sue him at pleasure, and the political inconveniences and complications which would be result."

We are inclined to think that this view correctly represents the results of the provisions of section 433 as much as of those contained in section 86 (1).

In view of our conclusion that section 86 (1) applies to the present suit, it follows that in the absence of the consent of the Central Government as prescribed by it, the suit cannot be entertained. On that view of the matter, it is not necessary to deal with the other question as to whether the respondents were justified in claiming absolute immunity under International Law. It is common ground that if there is a specific statutory provision such as is contained in section 86 (1) which allows a suit to be filed against a foreign State subject to certain conditions, it is the said statutory provision that will govern the decision of the question as to whether the suit has been properly filed or not. In dealing with such a question, it is unnecessary to travel beyond the provisions of the statute, because the statute determines the competence of the suit.

1. (1897) I.L.R. 21 Bom. 351 at pp. 371-2

The result is, the appeal fails and is dismissed. In view of the fact that we are affirming the decision of the Court of Appeal on a ground which did not succeed before that Court, we direct that parties should bear their own costs throughout.

K S

Appeal dismissed

## THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT — P B GAJENDRAGADKAR, Chief Justice, K N WANCHOO  
M Hidayatullah, J C SHAH AND S M SIKRI, JJ

Kamal Narain Sarma

Appellant\*

v

Dwarkan Prasad Mishra and others

Respondents

*Conduct of Election Rules (1961) Rule 94 A—Scope—Affidavit in support of election petition sworn before District Court Clerk of Court appointed under section 139 (c) Code of Civil Procedure (V of 1908)—If sufficient compliance with rule 94 A*

An affidavit sworn before a District Clerk of Court appointed under section 139 (c) Civil Procedure Code to administer oaths who undoubtedly is a Commissioner of Oaths can only be excluded by taking an extreme and technical view which is not justified. Rule 94 A of the Conduct of Election Rules (1961) makes receivable an affidavit sworn before a Commissioner of Oaths without specifying of what kind.

It is not necessary that an appointment with reference to the Oaths Act had to be made for the affidavits under Conduct of Election Rules.

Appeal from the Judgment and Order, dated the 15th April, 1964 of the Madhya Pradesh High Court in Miscellaneous Petition No. 90 of 1964.

M S Gupta, Advocate, for Appellant

G S Pathak, Senior Advocate, (Y S Dharmadhikari and A G Ratnaparkhi, Advocates, with him), for Respondent No. 1

The Judgment of the Court was delivered by

*Hidayatullah, J*—This appeal arises from an election petition filed after the last General Election to the Madhya Pradesh Legislative Assembly, in respect of the election, from the Kasdol Legislative Assembly constituency held on 4th May, 1963. The first respondent was declared elected and the appellant challenged his election alleging several acts of corrupt practices, publication of false statements, filing of false accounts etc. The election petition was supported by an affidavit sworn before K. S. Moghe, Officer for Administering Oaths on Affidavits, Jabalpur. Moghe was the Clerk of Court in the District Court, Jabalpur. The first respondent objected that the affidavit was not sworn before the proper authority as required by rule 94 A of the Conduct of Election Rules, 1961, and it was, therefore, prayed that the election petition should be dismissed or the allegations about corrupt practices should be struck out. The Election Tribunal, by an order dated 31st October, 1963 accepted the objection but allowed the filing of a proper affidavit and a fresh affidavit was taken on record. No action was taken against that order. It appears that the Election Tribunal had framed two issues for determination. They were

\* Issue No. 18. Whether the affidavit filed by the petitioner in support of his petition is valid in law as not properly sworn before a competent Officer duly authorised to attest and authenticate an affidavit and does not also comply with the provisions of section 83 of the Representation of the People Act and the Rules made thereunder? If so, whether the petition is liable to be dismissed on this ground?

Issue No. 20. Whether the various alleged acts of corrupt practices mentioned in the petition are duly supported by an affidavit as required under section 81 (3) of the Representation of the People Act? If not, what is its effect on this petition?

On 14th February, 1964, the first respondent filed an application drawing attention to the latter part of Issue No. 20 and asked *inter alia* for a finding whether

the election petition was not liable to be dismissed when the affidavit was not proper. The Tribunal by an order passed on 24th February, 1964, rejected the last contention and held that as a fresh affidavit was filed the petition could proceed to trial.

On 2nd March, 1964 the first respondent filed a petition under Articles 226 and 227 of the Constitution in the High Court of Madhya Pradesh challenging both the orders and asked that they be quashed. The High Court, by its order now under appeal by certificate, quashed the two orders and the Tribunal was directed to deal further with the petition in the light of the order of the High Court.

The High Court in an elaborate order has considered whether the provisions of rule 94-A were mandatory or directory but it did not address itself to the question whether the first affidavit was proper or not. This was, perhaps, due to the fact that the appellant seems to have conceded before the Tribunal that the first affidavit was not proper. This concession was sought to be withdrawn in this appeal by the appellant and on looking into the record we were satisfied that the concession was wrongly made and should be allowed to be withdrawn. We accordingly heard arguments on the question whether the original affidavit did not satisfy the Conduct of Election Rules and the Representation of the People Act. We are satisfied that the first affidavit was proper and the second affidavit was not necessary.

Before we give our decision on this point we shall first set down the relevant provisions. Section 83 of the Representation of the People Act provided that—

“83. (1) An election petition—

(a) shall contain a concise statement of the material facts on which the petitioner relies ;

(b) shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of such practice ; and

(c) shall be signed by the petitioner and verified in the manner laid down in the Civil Procedure Code, 1908 (V of 1908) for the verification of pleadings.

Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.

(2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition.”

Rule 94-A of the Conduct of Election Rules, 1961, next provides :

“94-A. The affidavit referred to in the proviso to sub-section (1) of section 83 shall be sworn before a Magistrate of the First Class or a Notary or a Commissioner of Oaths and shall be in Form 25.”

Form 25 need not be reproduced but the endorsement of the officer before whom the affidavit is sworn may be reproduced :

“Form 25

.....  
.....

Solemnly affirmed/sworn by Shri/Shrimati.....at.....this..... day of.....  
196 .

Before me.

Magistrate of the First Class/Notary/Commissioner of Oaths.”

The relevant rules of the High Court and the notifications issued by the Government have been placed in our hands. The High Court has framed Rules relating to the Civil Procedure Code and rule 20 dealing with affidavits reads :

“20. All Courts dealing with affidavits should make calls for affidavits at 11 A.M. and 2 P.M. every day. If the Clerk of Court or other ministerial officer is appointed a Commissioner for administering oath of affidavits, he will discharge that function at such time as may be fixed by the District Judge in this behalf.”

Rule 34 says :

“34. The Officer administering the oath shall make the following endorsement on every affidavit sworn before him and shall date, sign and seal the same.

Sworn before me on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_ by \_\_\_\_\_ son of \_\_\_\_\_  
 who is personally known to me (or) who has been identified by \_\_\_\_\_  
 whose signatures are hereto appended

Signature \_\_\_\_\_

Designation \_\_\_\_\_

SEAL

The affidavit which was sworn before Moghe bore the above endorsement and Moghe described himself as Officer for Administering Oaths on Affidavits, Jabalpur, Madhya Pradesh "

On 16th February, 1959, the Government of Madhya Pradesh had issued a notification under which District Judges were empowered under section 139 (c) of the Code of Civil Procedure to appoint Commissioners to administer oaths on affidavits made under the said Code and the District Judge Jabalpur, in exercise of the powers so conferred appointed among others the Clerk of Court attached to his office to be *ex-officio* Commissioner for the purpose of administration of oaths on affidavits made under the Code of Civil Procedure. It may be pointed out that subsequently in May 1960 the first notification was amended and in place of the words in the first notification empowers all the District Judges to appoint Commissioners to administer oaths on affidavits made. The words "generally empowers the Court of District Judges to appoint officers to administer oaths to deponents in cases of affidavits were substituted. This change does not affect the present matter because the appointment of Moghe was under the first notification and not under the second. The contention of the first respondent is that the affidavit did not comply with the requirements of rule 94 A because Moghe was not a Commissioner of Oaths but was an officer for Administration of Oaths for the purpose of section 139 (c) of the Code. We shall refer to that provision presently.

The rule does not state before which Commissioner the affidavit must be sworn. It must therefore, be read as including all Commissioners of Oaths duly appointed. The election petition is verified as a plaint but the affidavit is needed additionally when allegations of a particular type are made. The rule really requires an affidavit so that action for perjury may be based on it if the allegation is found to be false. We enquired whether, in the State of Madhya Pradesh, there was any other provision under which Commissioners of Oaths could be appointed but none was shown. The Indian Oaths Act, no doubt, consolidates the law relating to judicial oaths and for other purposes. Section 4 of that Act gives authority to "all Courts and persons having by law or consent of parties authority to receive evidence" "to administer, by themselves or by an officer empowered by them in this behalf, oaths and affirmations in discharge of the duties or in exercise of the powers imposed or conferred upon them respectively by law". This is a general provision and it mentions generally persons having by law authority to receive evidence. It is difficult to say that the Clerk of Court answers this description. But there are other provisions of law under which oaths may be administered for purposes of affidavits. Section 139 of the Code of Civil Procedure, under which the Clerk of Court was given this jurisdiction, provides

"139 Oath on affidavit by whom to be administered

In the case of any affidavit under this Code—

(a) any Court or Magistrate or

(b) any officer or other person whom a High Court may appoint in this behalf or

(c) any officer appointed by any other Court when the Provincial Government has generally or specially empowered in this behalf

may administer the oath to the deponent."

Similarly, section 539 of the Code of Criminal Procedure provides

"539 Courts and persons before whom affidavits may be sworn.—

Affidavits and affirmations to be used before any High Court or any officer of such Court may be sworn and affirmed before such Court or the Clerk of the State or any Commissioner or other

per on appointed by such Court for that purpose, or any Judge, or any Commissioner for taking affidavits in any Court of Record in India, or any Commissioner to administer oaths in England or Ireland or any Magistrate authorised to take affidavits or affirmations in Scotland."

It is therefore not necessary that an appointment with reference to the Oaths Act had to be made.

The Clerk of Court was appointed a Commissioner of Oaths under section 139 (c) quoted above. It is contended that the powers of such a Commissioner were to administer oaths for purposes of affidavits under the Code of Civil Procedure and this meant Order 19 of the Code. It is pointed out that none of the conditions under which the affidavit is required under that Order applies here. It is argued that Commissioners appointed under one statute cannot swear affidavits prescribed under another statute and section 539 of the Code of Criminal Procedure is also cited as an instance. This may be so. It may be that an affidavit sworn by a District Clerk of Court may not be good for the purposes of the Code of Criminal Procedure and *vice versa* but that is because the restriction is to be found in section 139 of the one Code and section 539 of the other. Rule 94-A makes no such conditions and makes receivable an affidavit sworn before a Commissioner of Oaths without specifying of what kind. In this view of the matter the affidavit sworn before the District Clerk of Court, who undoubtedly is a Commissioner of Oaths, can only be excluded by taking an extreme and technical view which, in our opinion, is not justified.

The appeal must therefore succeed on this short ground and it is not necessary to discuss whether the rule is mandatory or directory for, in any event, its requirements have been met. The appeal is allowed but as the appellant had earlier conceded the point on which the appeal succeeds, there shall be no order about costs. The case will now go back to Tribunal for decision on merits.

K.S.

*Appeal allowed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :— P. B. GAJENDRAGADKAR, Chief Justice, K. N. WANGHOO, M. HIDAYATULLAH, J. C. SHAH AND S. M. SIKRI, JJ.

M/s. Bundelkhand Motor Transport Co.

.. Appellant\*

v.

Behari Lal Chaurasia and another

.. Respondents.

Madhya Pradesh State Roadways Transport Corporation

.. Intervener.

*Motor Vehicles Act (IV of 1939), section 63 and Central Provinces and Berar Motor Vehicles Rules (1940), Rule 63—Scope and effect—Inter-regional permit—Renewal of permit but refusal of counter-signature—Effect—If Regional Transport Authority having jurisdiction over rest of route to give counter-signature.*

The Regional Transport Authority, Jabalpur, granted to the appellant a permit to ply stage carriages on an inter-regional route—Jabalpur to Chhaettarpur—in the State of Madhya Pradesh; and the permit was countersigned by the Regional Transport Authority, Rewa, within whose jurisdiction a part of the route lay. The renewed permit which was countersigned by the Rewa Regional Transport Authority was to expire on 9th August, 1963. On 6th June, 1963 the appellant applied to the Regional Transport Authority, Jabalpur, for renewal of the permit and by order dated 6th December, 1963, the permit was renewed for the period ending 9th February, 1966. By its application dated 7th December, 1963, the appellant requested the Regional Transport Authority, Rewa, to countersign the permit so renewed. This application was published on 2nd January, 1964. Three motor transport operators objected to the grant of counter-signature on the ground that the application was barred by limitation under section 58 (2) proviso as it was not made within sixty days of its expiry. The Regional Transport Authority, Rewa, overruled the objection and by order dated 17th March, 1964, granted counter-signature of the permit. The High Court on application for writ by one the objectors quashed the order. On appeal to the Supreme Court,

*Held*, it was unnecessary to express any opinion on the above question as the matter could be disposed of on the construction of the Central Provinces and Berar Motor Vehicles Rules, 1940 which were in operation in the two regions Jabalpur and Rewa in the State of Madhya Pradesh. The Regional Transport Authority Jabalpur, was competent to grant renewal of the permit and was also competent by virtue of rule 63 of the Rules to countersign the permit so as to make it valid even for that part of the route which lay in the Rewa region. Rule 63 prevails over the provision in section 63 of the Motor Vehicles Act. The State Government had the power to frame rule 63. In the instant case the application of the appellant to the Regional Transport Authority Jabalpur was rejected and granted only renewal of permit. In effect the permit was an effective regional permit for the route in Jabalpur Authority's jurisdiction and not an inter regional permit and there was no part of the route for which the Regional Transport Authority, Rewa could by countersigning the permit extend it so as to make it operative within the Rewa region.

In any event as one Regional Transport Authority is not competent to sit in judgment over the discretion exercised by any other Regional Transport Authority upon whom the power is conferred in regard to a particular matter under the statute the order of the Regional Transport Authority Rewa, granting counter-signature in the teeth of the earlier order of the Jabalpur Authority was invalid.

Appeal from the Judgment and Order dated the 11th November, 1964 of the Madhya Pradesh High Court in Miscellaneous Petition No 238 of 1964.

G S Pathak, Senior Advocate, (A G Ratnaparkhi, Advocate with him), for Appellant

B R L Iyengar, Manmohan Krishnan Iyengar, S K Mehra and A L Mehta, Advocates, for Respondent No 1

S V Gupta, Solicitor General of India, (J N Shroff, Advocate with him), for Intervener

The Judgment of the Court was delivered by

*Shah, J*—In 1957 the Regional Transport Authority, Jabalpur, granted to Messrs Bundelkhand Motor Transport Company, Nowgaon—hereinafter called 'the appellant'—a permit under the Motor Vehicles Act, 1939 to ply stage carriages on an inter regional route—Jabalpur to Chhatarpur—in the State of Madhya Pradesh, and the permit was countersigned by the Regional Transport Authority, Rewa, within whose jurisdiction a part of the route lay. The permit was renewed in 1960 for a period of three years expiring on 9th August, 1963 by the Regional Transport Authority, Jabalpur, and it was countersigned by the Regional Transport Authority, Rewa. On 7th June, 1963, the appellant applied to the Regional Transport Authority, Jabalpur, for renewal of the permit, and by order dated 6th December, 1963 the permit was renewed for the period ending 9th February, 1966. By its application dated 7th December, 1963, the appellant requested the Regional Transport Authority, Rewa, to countersign the permit so renewed. This application was published as required by section 57 read with section 63 (3) of the Act on 2nd January 1964. Three motor transport operators amongst whom was the first respondent Behari Lal Chaurasia, objected to the grant of counter-signature to the permit, *inter alia* on the ground that the application was barred by the law of limitation prescribed by section 58 (2) proviso one, and the Regional Transport Authority, Rewa, had no power to grant counter signature of renewal after the expiry of that period. The Regional Transport Authority, Rewa, overruled the objection, and by order dated 17th March, 1964, granted counter-signature of the permit.

The first respondent then applied to the High Court of Madhya Pradesh under Articles 226 and 227 of the Constitution for a writ quashing the order dated 17th March, 1964, passed by the Regional Transport Authority, Rewa. In the view of the High Court an application for renewal of the permit and an application for renewal of counter signature must be made within the period prescribed by section 58 (2) of the Act, and the appellant having failed to apply within that period the application of the appellant for renewal of the counter signature was barred and the Regional Transport Authority, Rewa, had no jurisdiction to countersign the

permit renewed by the Regional Transport Authority, Jabalpur. The High Court accordingly quashed the order dated 17th March, 1964. With certificate granted by the High Court under Article 133 (1) (c) of the Constitution, the appellant has appealed to this Court.

It may be convenient in the first instance to refer to the material provisions of the Motor Vehicles Act (IV of 1939) which have a bearing on the validity of the order dated 17th March, 1964. Section 45 of the Motor Vehicles Act provides that every application for a permit shall be made to the Regional Transport Authority of the region in which it is proposed to use the vehicle or vehicles. By the proviso to section 45 it is enacted that where it is proposed to use the vehicle or vehicles in two or more regions lying within the same State, the application shall be made to the Regional Transport Authority of the region in which the major portion of the proposed route or area lies. Section 47 sets out the procedure of the Regional Transport Authority in considering applications for stage carriage permits and prescribes the matters which may be taken into account by that officer in granting or rejecting the applications for stage carriage permits. By section 48 it is provided that subject to the provisions of section 47, a Regional Transport Authority may, on an application made to it, grant a stage carriage permit, in accordance with the application or with such modifications as it deems fit, valid for a specified route or routes or specified area. Sub-section (3) of section 48 authorises the Authority to grant a stage carriage permit subject to one or more of the conditions specified therein. Section 57 prescribes the procedure in "applying for and granting permits". An application for a stage carriage permit or a public carrier's permit shall, it is provided by sub-section (2), be made not less than six weeks before the date on which it is desired that the permit shall take effect, or, if the Regional Transport Authority appoints dates for the receipt of such application, on such dates. By sub-section (1) of section 58 it is provided that a stage carriage permit or a contract carriage permit other than a temporary permit shall be effective without renewal for such period not less than three years and not more than five years, as the Regional Transport Authority may specify in the permit. Sub-section (2) enacts that a permit may be renewed on an application made and disposed of as if it were an application for a permit, provided that the application for the renewal of a permit shall be made (a) in the case of a stage carriage permit or a public carrier's permit, not less than sixty days before the date of its expiry; and (b) in any other case, not less than thirty days before the date of its expiry. By sub-section (3) the Authority is, notwithstanding anything contained in the first proviso to sub-section (2), authorised to entertain an application for the renewal of a permit after the last date specified in the said proviso, if the application is made not more than fifteen days after the said last date. Section 63 deals with inter-regional and inter-State permits. The material parts of the section are as under :—

"(1) Except as may be otherwise prescribed a permit granted by the Regional Transport Authority of any one region shall not be valid in any other region, unless the permit has been countersigned by the Regional Transport Authority of that other region, and a permit granted in any one State shall not be valid in any other State unless countersigned by the State Transport Authority of that other State or by the Regional Transport Authority concerned :

Provided \* \* \*

(2) A Regional Transport Authority when countersigning the permit may attach to the permit any condition which it might have imposed if it had granted the permit, and may likewise vary any condition attached to the permit by the Authority by which the permit was granted.

(3) The provisions of this Chapter relating to the grant, revocation and suspension of permits shall apply to the grant, revocation and suspension of counter-signatures of permits :

Provided \* \* \*

Section 68 by the first sub-section authorises the State Government to make Rules for the purpose of carrying into effect the provisions of Chapter IV.

A stage carriage permit granted by a Regional Transport Authority therefore remains effective without renewal for a period of not less than three years and not more than five years as the Authority may specify in the permit. A person desiring to obtain renewal of the permits must, in the case of a stage carriage permit,



make an application not less than sixty days before the date of its expiry, and the Authority has to deal with the application for renewal as if it were an application for a permit. The procedure for obtaining renewal is assimilated to the procedure prescribed for an application for a first permit, but in order that there may be no hiatus the Legislature has provided that the application for renewal shall be made not less than sixty days before the date of its expiry, it being assumed that the Authority would be able in the interval to publish the application, and to hear objections to the grant of renewal. Except as may be otherwise prescribed, an inter regional permit by a Regional Transport Authority in any region, is not valid unless the permit is countersigned by the Regional Transport Authority of that other region. The provisions of Chapter IV relating to the grant, revocation and suspension of permits apply to the grant, revocation and suspension of counter signatures of permits.

The High Court held that an application for renewal of counter signature has also to be made not less than sixty days before the date of its expiry and if no such application is made, the Regional Transport Authority has no power to countersign the permit and on that ground discharged the order issued by the Regional Transport Authority, Rewa. It was urged on behalf of the appellant that by section 63 (3) the provisions contained in Chapter IV relating to grant, revocation and suspension of permits are made applicable to grant of counter signature of permits, to the application for counter signature of an inter regional permit, the provisions relating to renewal contained in section 58 have no application. Counsel for the respondent submitted that a permit granted by an Authority competent under section 45 of the Act is an integrated permit in respect of a unitary route, and until the permit is countersigned by the Authority in the other region, it is wholly ineffective.

We do not think it necessary to express any opinion on the contentions advanced by the parties on this part of the case for, we are of the view that this appeal may be decided on the interpretation of the Rules made by the State Government in regard to grant of permits and counter signature of inter regional permits. Under the Motor Vehicles Act, 1939 the Central Provinces and Berar Motor Vehicles Rules 1940 were made by the appropriate authority and it is common ground that those Rules were at the material time in operation in the two regions—Jabalpur and Rewa—in the State of Madhya Pradesh with which we are concerned. By rule 61, it was provided

“(1) Application for the renewal of a permit shall be made in writing to the Regional Transport Authority by which the permit was issued not less than two months in the case of a stage carriage permit or a public carriage permit and not less than one month in other cases before the expiry of the permit and shall be accompanied by Part A of the permit. The application shall state the period for which the renewal is desired and shall be accompanied by the fee prescribed in rule 55.

“(2) The Regional Transport Authority renewing a permit shall call upon the holder to produce Part A or Parts B thereof as the case may be and shall endorse Parts A and B accordingly and shall return them to the holder.

Rule 62, by clause (a) provided

“Subject to the provisions of rule 63 application for the renewal of a counter-signature on a permit shall be made in writing to the Regional Transport Authority concerned and within the appropriate periods prescribed in rule 61 and shall subject to the provisions of sub-rule (2) be accompanied by Part A of the permit. The application shall set forth the period for which the renewal of the counter-signature is required.

Rule 63, by clause (a), provided

“The authority by which a permit is renewed may unless any authority by which the permit has been countersigned (with effect not terminating before the date of expiry of the permit) has by general or special order otherwise directed likewise renew any counter-signature of the permit by endorsement of the permit in the manner set forth in the appropriate form and shall in such case intimate the renewal to such authority.

Rule 61 substantially incorporates the provisions of sub-section (2) of section 58 and the proviso thereto and makes certain incidental provisions. By clause (a)

of rule 62 it is provided that the application for renewal of counter-signature has to be made within the period prescribed in rule 61 *i.e.*, it has to be made not less than two months before the expiry of a stage carriage permit or a public carrier's permit. By rule 63, power is conferred upon the Authority which grants an inter-regional permit under the first proviso to section 45, (unless by any general or special order the other Authority has directed otherwise) to countersign the permit so as to make it valid for the other region covered by the route. Therefore, even though by section 63 the power to countersign the permit is entrusted to the Regional Transport Authority of the region in which the remaining part of the route is situate, by rule 63 the power to countersign may also be exercised by the Authority who grants the original permit. The Regional Transport Authority, Jabalpur, was therefore competent to grant renewal of the permit and was also competent by virtue of rule 63 to counter sign the permit as so to make it valid even for that part of the route which lay in the Rewa region.

The Legislature has by providing in the opening part of sub-section (1) 'Except as may be otherwise prescribed' made the provision subject to the Rules framed under section 68, and a rule conferring authority to countersign the permit in so far as it relates to another region upon the Authority who issues the permit is made. The validity of a section which is made subject to the provisions of the Rules to be framed by a piece of delegated legislation is not challenged before us. Rule 63 must therefore prevail over the direction of the statute. There is no substance in the contention raised by Counsel for the appellant that the State Government had no power to frame rule 63. Power to frame Rules for carrying into effect the provisions of Chapter IV is expressly granted to the State Government by section 68, and the exercise of that power, if it be utilised for the purpose of carrying into effect the provisions of the Act, is not subject to any other implied limitations.

In the present case an application for countersignature of renewal of the permit was made to the Regional Transport Authority, Jabalpur, and it was rejected. It is unfortunate that the application and the reasons in support of the order of the Authority are not on the record of the case. But it appears clear from the following recital in the order of the Regional Transport Authority, Rewa that the application for countersignature was made to the Authority at Jabalpur and it was rejected :

"Need for moving this authority for getting the counter-signature renewed certainly arose when the R. T. A. Jabalpur, declined to sanction the renewal of counter signature."

Truth of this recital is accepted by Counsel at the Bar. The result therefore is that an application was made under section 63 read with section 58 (2) to the Regional Transport Authority, Jabalpur for renewal of the permit and also for counter-signature of the renewal of the permit. The Regional Transport Authority, Jabalpur, granted renewal of the permit, but declined to grant counter-signature of the permit, in so far as it related to the Rewa region. Under section 63 a permit granted by the Regional Transport Authority of one region is not valid in any other region, unless the permit has been countersigned by the Regional Transport Authority of that other region. The clearest implication of this provision is that even an inter-regional permit when granted is valid for the region over which the Authority granting the permit has jurisdiction, and when it is countersigned by the Regional Transport Authority of the other region, the permit becomes valid for the entire route. We are unable to agree with Counsel for the respondent that the permit has no validity whatever until it is countersigned by the Regional Transport Authority of the other region.

The Regional Transport Authority, Jabalpur, renewed the permit for the Jabalpur region, but declined to counter-sign the permit in exercise of the power conferred by rule 63 framed under section 68 of the Motor Vehicles Act in respect of the route within the Rewa region. The conclusion is inevitable that the Authority granted the permit only operative between Jabalpur and the point at which the route

entered the Rewa region in substance, he merely granted a regional permit limited to the route within the Jabalpur region. The permit being a regional permit and not an inter regional permit there was no part of the route for which the Regional Transport Authority, Rewa could by countersigning the permit extend it so as to make it operative within the Rewa region. In any event as one Regional Transport Authority is not competent to sit in judgment over the discretion exercised by any other Regional Transport Authority upon whom the power is conferred in regard to a particular matter under the statute, the order of the Regional Transport Authority, Rewa, granting counter signature in the teeth of the earlier order of the Jabalpur Authority was invalid.

We therefore confirm the order of the High Court, but for different reasons. We deem it however necessary to make it clear that our order does not affect the validity of the permit granted by the Regional Transport Authority, Jabalpur, in so far as it relates to the route between Jabalpur and the point of entry of the route into the Rewa region. The appellant will pay the costs to the respondent in this appeal.

K.S.

*Appeal dismissed*

## THE SUPREME COURT OF INDIA

(Criminal Appellate Jurisdiction)

PRESENT —A K. SARKAR, RAGHUBAR DAYAL AND V. RAMASWAMI, JJ

P. C. Gulati

*Appellant\**

Lajya Ram and others

*Respondents*

*Criminal Procedure Code (V of 1898) section 526 (1) (ii)—Scope—High Court if competent to transfer case pending before a Magistrate for trial to a Court of Sessions Judge*

*By majority (with Ramaswami, J. holding contra).—*The High Court is competent under section 526 (1) (ii) of the Code of Criminal Procedure to transfer a case from the Court of a Magistrate to the Court of the Sessions Judge. The omission to provide specifically the procedure to be followed in the trial of a case transferred to the Court of Sessions by the High Court in the exercise its powers under section 526 of the Code will not make the transfer illegal when the language of clause (ii) of sub-section (1) of section 526 confers the power on the High Court of transferring a case from the Court of a Magistrate to the Court of superior jurisdiction which a Court of Session is. The proceedings have already been initiated by the Magistrate and have been simply transferred to the Court of Session. The Court of Session has simply to proceed with the inquiry or trial as the case may be as the case has been made over to it by the High Court. Section 193 and other sections of the Code relating to taking cognizance of the offence have no application to the transferred case which has to be proceeded with by the transferee Court.

*Per Ramaswami, J.—*Section 526 (1) (ii) must be so interpreted as not to conflict with section 193 of the Code of Criminal Procedure. The language of section 526 (1) (i) must be restricted so as to be consistent with and be harmonious with the requirement of section 193 of the Criminal Procedure Code. In the absence of express provision in the Code as to the mode of trial of a case transferred from a Magistrate to a Court of Sessions Judge it must be held that the Sessions Judge has no jurisdiction to proceed with the trial of the case transferred to it by the High Court.

Appeal, by Special Leave from the Judgment and Order, dated the 13th March, 1964 of the Punjab High Court (Circuit Bench) at Delhi in Criminal Revision No 30-D of 1964 and Criminal Misc. No 63 D of 1964 and Appeal by Special Leave from the Judgment and Order dated the 12th March 1964, of the Punjab High Court (Circuit Bench) at Delhi in Criminal Misc. No 500-D of 1964.

*S. N. Andley, Rameshwar Nath and Mahender Narain, Advocates of M/s. Rajender Narain & Co., for Appellants (In all the Appeals)*

*Ram Lal Anand*, Senior Advocate (*J. B. Dadachanji*, Advocate of *M/s. J.B. Dadachanji & Co.*, with him) for Respondent Nos. 1 and 2 (In all the Appeals).

*R. N. Sachthey*, Advocate, for Respondent No. 3 (In all the Appeals).

The Court delivered the following Judgments :

*Raghubar Dayal, J.* (for *Sarkar, J.* and himself).—The sole question which determines these appeals is whether the High Court can transfer a case pending in the Court of a Magistrate to the Court of the Additional Sessions Judge.

It is urged for the appellant, who had actually moved for the transfer of the case, that the High Court has no such power. The respondents contend that the High Court has such power.

Chapter XLIV of the Code of Criminal Procedure, hereinafter called the Code deals with transfer of criminal cases. Section 526, in that Chapter, empowers the High Court to pass the following orders whenever it is made to appear to the High Court that the requirements of either of clauses (a) to (e) of sub-section (1) thereof exists :

“(i) that any offence be inquired into or tried by any Court not empowered under sections 177 to 184 (both inclusive) but in other respects competent to inquire into or try such offence ;

(ii) that any particular case or appeal, or class of cases or appeals, be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction ;

(iii) that any particular case or appeal be transferred to and tried before itself ; or

(iv) that an accused person be committed for trial to itself or to a Court of Session.”

The language of clause (ii) is wide enough to provide for an order transferring a case from the Court of a Magistrate to a Court of Session as both the Courts are subordinate to the High Court and the Court of Session is a Court superior in jurisdiction to that of a Magistrate.

Reference may be made to section 6 which reads :

“Besides the High Courts and the Courts constituted under any law other than this Code for the time being in force, there shall be five classes of Criminal Courts in India, namely :—

I.—Courts of Session ;

II.—Presidency Magistrates ;

III.—Magistrates of the First Class ;

IV.—Magistrate of the Second Class ;

V.—Magistrates of the Third Class ;

It is clear that the Courts are mentioned in the order of their superiority in respect of jurisdiction. It is not urged for the appellant that the language of clause (ii) of sub-section (1) of section 526 does not give power to the High Court to transfer the case from a Court of a Magistrate to that of a Sessions Judge. What is urged for the appellant is that the provisions of sub-clause (ii) should be so construed as to limit its provisions to the transfer of cases from the Court of a Magistrate to another Court of a Magistrate, as otherwise there would be difficulties in the trial of the case by the Sessions Court when it is transferred to it from the Court of a Magistrate.

The first difficulty urged is that section 193 of the Code *inter alia* provides that except as otherwise expressly provided by the Code or by other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the accused has been committed to it by a Magistrate duly empowered in that behalf ; that there is no express provision in the Code which empowers the Court of Session to take cognizance of the case as a Court of original jurisdiction when it be transferred to it by a High Court and that therefore the Court of Session is incompetent to take cognizance of such a case and try it.

Another difficulty suggested is that neither section 526 nor any other provision of the Code provides for the procedure to be followed by the Sessions Judge in the

trial of the case transferred to it by a High Court and that the procedure laid down for the trial of a case by the Court of Session will not be suitable for the trial of the transferred case as section 271 of the Code requires the Court of Session to commence the trial by reading the charge, a charge which according to other provisions of the Code is to be framed by the Magistrate who commits the case.

We do not consider any of these contemplated difficulties in the trial of the transferred case by the Court of Session to be of any significance.

We may deal with the second contention first. The omission to provide specifically the procedure to be followed in the trial of a case transferred to the Court of Session by the High Court in the exercise of its powers under section 526 of the Code will not make the transfer illegal, when the language of clause (ii) of sub-section (1) confers the power on the High Court of transferring a case from the Court of a Magistrate to the Court of superior jurisdiction, which a Court of Session is. Support for this contention was sought, for the appellant, from sub-section (2) of section 526 which provides that when the High Court withdraws for trial before itself any case from any Court other than a Court of a Presidency Magistrate, it shall, except as provided for in section 267, observe in such trial the same procedure which that Court would have observed if the case had not been so withdrawn. If the withdrawal of the case is equivalent to the transfer of a case in exercise of powers conferred by clause (iii) which empowers the High Court to order any particular case to be transferred to and tried before itself, the provision of sub-section (2), though providing for the procedure to be followed by the High Court in the trial of cases withdrawn from the Court of a Magistrate other than a Presidency Magistrate, does not provide for the procedure to be followed by the High Court when it withdraws the case from the Court of a Presidency Magistrate. It is clear therefore that the mere omission of the procedure to try a case withdrawn from the Court of a Presidency Magistrate does not mean that the High Court cannot withdraw a case from his Court in view of the clear words of clause (iii).

There is no difficulty in our opinion in the Court of Session trying the case transferred to it in accordance with the provisions of Chapter XXIII which deals with the procedure of trials before High Courts and Courts of Session. The Court of Session has to follow the procedure laid down in this Chapter so far as that be applicable to the cases to be tried by it. This is clear not only from the heading of the Chapter but also from the provisions of section 268 which require all trials before a Court of Session to be either by jury or by the Judge himself, and of section 270 which require the Public Prosecutor to conduct the prosecution in every trial before a Court of Session. Of course, special procedure laid down for particular type of cases and proceedings will be followed in those cases as special provisions over-ride general provisions of Chapter XXIII. Such special provisions are to be found in sections 193-B (5), 481 and 485-A of the Code.

Section 271 provides that when the Court is ready to commence the trial, the accused shall appear or be brought before it, and the charge shall be read out in Court and explained to him, and he shall be asked whether he is guilty of the offence charged, or claims to be tried. It does not say that the charge to be read must be the charge framed by the Magistrate who commits the case. It is the Sessions Judge who is to read out the charge on which the accused is to be tried by him. It may be that in the cases committed to the Court of Session the Sessions Judge mostly reads the same charge which has been framed by the Magistrate. It is however open to him to re-frame the charge and read out the charge as framed by him. In practice the Session Court does amend and add to the charge before proceeding with such cases and it is the charge as amended by him which is read out to the accused, the whole object of the charge being that the accused should know what offences he has to meet at the trial. The Session Judge can follow a similar procedure when a case is transferred to his Court after the Magistrate has framed the charge. When the Magistrate has not framed a charge, the Sessions Judge can do so on the basis of the prosecution allegations.

The other procedure for the trial of the accused is what is to be normally followed in the trial of warrant cases, and is laid down in sections 286 to 292 and sections 309 to 311. In certain cases the provisions of sections 287 and 288 cannot however be complied with in the trial of cases transferred to the Court of Session by the High Court if the accused has not been examined by the Committing Magistrate and if no evidence is recorded by him. Such a contingency can arise in the trial of cases committed by a Magistrate in pursuance of the provisions of section 207-A as it is not incumbent on him to examine any witness or the accused before committing him to the Court of Sessions : *Shri Ram v. State of Maharashtra*<sup>1</sup>.

The provisions of section 291 which refer to the summoning of witnesses for the accused may create a difficulty inasmuch as the accused is not given the right to have any witness summoned except as provided in sections 207-A, 211 and 231. The difficulty would be more theoretical than practical, as no Court will think of not affording an opportunity to the accused to summon defence evidence when in view of the transfer of the case by the High Court the accused could not comply with such provisions which require him in commitment proceedings to give a list of witnesses in the Court of the Committing Magistrate.

We therefore do not consider that there arises any difficulty in the trial of the accused by the Court of Session in a case transferred to it by the High Court from the Court of a Magistrate.

We may now deal with the first objection which is really the main objection of the appellant about the trial of the case by a Sessions Judge on its being transferred to him by the High Court. Section 193 of the Code prohibits the Court of Session to take cognizance of any offence as a Court of original jurisdiction unless the accused is committed to it by a Magistrate or there is any other express provision in the Act. Such express provisions, according to the appellant, are to be found in a few sections of the Code. Section 198-B empowers the Court of Session to take cognizance of an offence under section 500, Indian Penal Code on a complaint of the public Prosecutor without the case being committed to it for trial.

Section 480 empowers any Civil, Criminal or Revenue Court to take cognizance of the offences mentioned in that section and section 485-A empowers a Criminal Court to take cognizance of the offence committed by a witness on account of his non-attendance in obedience to a summons. It is to be noticed that sections 480 and 485-A do not specifically mention the Court of Session, but these provisions can be availed of by that Court in view of the expression 'criminal Court' being wide enough to include a Court of Session.

Reference was also made to sections 437 and 478, but they speak of commitment of the accused to the Court of Session in certain circumstances.

Section 193 and the other sections of the Code refer to the taking of cognizance of an offence by the Court of Session. The question is what amounts to the taking of cognizance of an offence by a Court and whether the Court of Session's proceeding with a case transferred to it by the High Court, amounts to its taking cognizance of the offence under trial in the case.

Chapter XV of the Code deals with jurisdiction of criminal Courts in inquiries and trials. Part A consisting of sections 177 to 189 deals with the place of inquiry or trial. These sections deal with the territorial jurisdiction of various Courts to enquire into or try offences. Part B deals with the conditions requisite for initiation of proceedings and therefore with the conditions governing the power of a Court to commence, for the first time, proceedings in connection with offences about which the party aggrieved or the State desires to take action. Part B of Chapter XV consists of sections 190 to 199-B.

1. (1961) 1 M.L.J. (S. G.) 221 : (1961) 1 An. (1961) 1 S.C.J. 677.  
W.R. (S.G.) 221 : (1961) M.L.J. (Gr.) 342 :

In *R R Chari v The State of Uttar Pradesh*<sup>1</sup> this Court approved of the following observations of Das Gupta, J, in *Remembrancer of Legal Affairs, West Bengal v Abam Kumar Banerjee*<sup>2</sup>

"What is taking cognizance has not been defined in the Criminal Procedure Code and I have no desire to attempt to define it. It seems to me clear however that before it can be said if at any Magistrate has taken cognizance of any offence under section 190 (1) (a) Criminal Procedure Code, he must not only have applied his mind to the contents of the petition but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter—proceeding under section 200 and thereafter sending it for inquiry and report under section 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter but for taking action of some other kind e.g. ordering investigation under section 176 (3) or issuing a search warrant for the purpose of the investigation he cannot be said to have taken cognizance of the offence.

When the Sessions Court receives a case on transfer by the High Court it is not to consider whether it should proceed or not with the case. It has to proceed with the case as it has been transferred to it by the High Court. There is therefore no occasion for the Court of Session to take cognizance of the offence in the sense that it has to determine whether the proceeding should be initiated in connection with the offence or not. The proceedings have been already initiated by the Magistrate and have been simply transferred to it. It has simply to proceed with the inquiry or trial as the case may be as the case has been made over to it by the High Court.

A consideration of the provisions of the various sections in Part B of Chapter XV of the Code dealing with initiation of proceedings also makes out the difference between the taking of cognizance of a case and the subsequent inquiry and trial of the offences of which cognizance has been taken. Section 190 provides that Magistrates can take cognizance of a case in either of the three ways mentioned in sub-section (1). Section 191 provides for the transfer or commitment of the case in which the Magistrate has taken cognizance of the offence under sub-section (1) (c) of section 190, i.e., on information received from any person other than a Police Officer or upon his own knowledge or suspicion that an offence has been committed, if the accused objects to being tried by that Magistrate. The provisions of this section makes a distinction between the taking of cognizance of an offence and its subsequent trial by that Magistrate or by another Court. Similarly section 192 provides for the transfer of a case, of which the Magistrates mentioned in the section have taken cognizance for inquiry or trial, to another Magistrate subordinate to the particular Magistrate. The language indicates that the Magistrate to whom the case is to be transferred has not to take cognizance of the case afresh but has simply to proceed with the inquiry or trial of the case. Section 193 is the section which we have considered and, in the context of the various sections, the taking cognizance of an offence as a Court of original jurisdiction must amount to the initiation of the proceedings for the first time in a Court and not in the subsequent enquiry or trial necessary for the disposal of the case. The other sections in this Part simply provide restrictions for the taking of cognizance of offences in certain circumstances.

When a case is committed to the Court of Session, the Court of Session has first to determine whether the commitment of the case is proper. If it be of opinion that the commitment is bad on a point of law, it has to refer the case to the High Court which is competent to quash the proceeding under section 215 of the Code. It is only when the Sessions Court considers the commitment to be good in law that it proceeds with the trial of the case. It is in this context that the Sessions Court has to take cognizance of the offence as a Court of original jurisdiction and it is such a cognizance which is referred to in section 193.

We are therefore of opinion that the further proceedings by the Court of Session in a case transferred to it by the High Court are not barred by section 193 of the Code.

<sup>1</sup> (1951) S.G.J. 302 (1951) 1 M.L.J. 617  
(1951) S.C.R. 312

<sup>2</sup> A.I.R. 1950 Cal. 437

Further it would be incongruous if the High Court be competent to transfer a case from the Court of a Magistrate to itself and try it but it be not competent to transfer a case to the Court of Session. There does not appear to be any reason which would have induced the Legislature to contemplate the application of clause (ii) of sub-section (1) of section 526 to the transfer of cases from the Court of a Magistrate to the Court of any other Magistrate of equal or superior jurisdiction and not to the Court of Session. Clause (iv) expressly mentions the power of the High Court to order commitment of an accused for trial to itself or to a Court of Session. Such an order can however be passed only when the proceedings in the Court of the Magistrate have reached that stage when it be possible for the High Court to direct the committal of the accused to the Court of Session or to itself. An order for the commitment of the accused cannot be passed at any earlier stage while the transfer of a case can be made at any stage at which the case may be when transfer is sought.

Lastly, reference may be made to section 527 of the Code which empowers the Supreme Court to direct that any particular case or appeal be transferred from one High Court to another High Court or from a Criminal Court subordinate to one High Court to another Criminal Court of equal or superior jurisdiction subordinate to another High Court. The language of the section empowers this Court to transfer a case from the Court of a Magistrate under one High Court to a Court of another Magistrate of equal or superior jurisdiction, or to a Court of Session, subordinate to another High Court. This Court actually transferred one case from the Court of a Magistrate to the Court of an Additional Sessions Judge as is clear from the judgment of this Court in *Harbhajan Singh v. State*<sup>1</sup>. It may also be mentioned that there is nothing in section 527 about the procedure which the transferee Court has to adopt for the further progress of the case. Sub-section (3) of section 527 simply gives an option to the transferee Court to act on the evidence already recorded or partly so recorded and partly recorded by itself or to re-summon witnesses and re-commence the inquiry or trial.

We are therefore of opinion that the High Court is competent under section 526 (1) (ii) of the Code to transfer a case from the Court of a Magistrate to the Court of the Sessions Judge.

The order under appeal in Cr. A. No. 88 of 1965, dated 13th March, 1964, transferring the case to the Court of the Additional Sessions Judge is therefore correct. We therefore dismiss this appeal. Cr. A. No. 86 of 1965 is also against the order of the High Court dated 13th March, 1964, allowing the revision against the order of the Sessions Judge refusing to transfer the case from the Court of the Magistrate. That order being correct, we dismiss Cr. A. No. 86 of 1965.

Cr. A. No. 87 of 1965 is against the order of the High Court refusing to review its order of transfer dated 13th March, 1964. That appeal is therefore dismissed as infructuous.

*Ramaswami, J.*—I regret that I do not agree to the judgment pronounced by my learned brother Raghubar Dayal, J.

The appellant, P.C. Gulati filed a criminal complaint under section 500, Indian Penal Code, against the respondents—Lajya Ram Kapur and Diwan Chand Kapur in the Court of the Sub-Divisional Magistrate, New Delhi. Later on, the appellant made an application under section 528, Criminal Procedure Code to the Sessions Judge praying for the transfer of the case from the Court of the Sub-Divisional Magistrate to another Court of competent jurisdiction, but the application was dismissed. The appellant thereafter filed a Revision Petition, Criminal Revision No. 30-D of 1964 in the Circuit Bench of the Punjab High Court against the order of the Sessions Judge refusing transfer of the case. The appellant also filed an application, Criminal Miscellaneous No. 63-D of 1964 under section 526 of the Criminal Procedure Code in the Circuit Bench of the Punjab High Court for transfer of the case. On 13th March, 1964, the learned Chief



Justice of the High Court allowed the Revision Petition and also the application under section 526 of the Criminal Procedure Code and transferred the criminal case to the Court of Sri P. N. Thukral, Additional Sessions Judge Delhi for disposal. The appellant then realised that the Additional Sessions Judge Delhi had no jurisdiction to try and dispose of the Criminal Petition in view of the provisions of section 193 (1) of the Criminal Procedure Code and therefore applied to the Punjab High Court under section 561 A of the Criminal Procedure Code praying that the criminal complaint may be transferred to a Magistrate of competent jurisdiction. This application was dismissed by the learned Chief Justice of the Punjab High Court on 12th March 1965 on the ground that the High Court had no power to review its previous order. Criminal Appeals No. 86 and 88 of 1965 are brought by Special Leave against the order of the learned Chief Justice Punjab High Court dated 13th March 1964 in Criminal Revision No. 30 D of 1964 and Criminal Miscellaneous No. 63 D of 1964 transferring the complaint to the Court of the Additional Sessions Judge Delhi for disposal. Criminal Appeal No. 87 of 1965 is brought by Special Leave against the order of the learned Chief Justice Punjab High Court dated 12th March 1965, refusing to review his previous order dated 13th March 1964.

The first question arising for determination in this case is whether the Additional Sessions Judge Delhi has jurisdiction to try the criminal case filed by the appellant without any order of commitment of the respondents by a competent Magistrate. Section 193 (1) of the Criminal Procedure Code states

193. (1) Except as otherwise expressly provided by this Code or by any other law for the time being in force no Court shall take cognizance of any offence as a Court of original jurisdiction unless the area in which the offence is committed is by a Magistrate duly empowered in that behalf.

Section 526 of the Criminal Procedure Code states

526. (1) Whenever it is made to appear to the High Court

(a) that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto or

(b) that a fair and impartial inquiry or trial for the ends of justice or is required by any provision of the Code, it may order—

(i)

(b) that any particular case or appeal or class of cases or appeals be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction.

On behalf of the respondents it was submitted by Mr. Anand that the Additional Sessions Judge has jurisdiction to proceed with the trial of the criminal case in view of the order of transfer made by the High Court and the procedure to be followed should be that of a warrant case as contemplated by section 526 (2) of the Criminal Procedure Code which states

526. (2) When the High Court withdraws for trial before itself any case from any Court other than the Court of a Presidency Magistrate it shall, except as provided in section 267, observe in such trial the same procedure which that Court would have observed if the case had not been so withdrawn.

It was conceded by the learned Counsel that the provision of section 526 (2) applies only to a case which has been withdrawn by the High Court for trial before itself from any other Criminal Court subordinate to it but it was contended that the principle of that sub-section should apply also to a criminal case transferred by the High Court to the Additional Sessions Judge from the Court of a Magistrate. In our opinion there is no warrant for this argument. It is manifest that section 526 of the Criminal Procedure Code does not expressly provide for the procedure to be followed by the Additional Sessions Judge in a case of this description. It follows therefore that for the trial of a case of this description the Legislature has not enacted any express provision to the contrary within the meaning of section 193 (1) Criminal Procedure Code. This view is supported by reference to section 526 (2) Criminal Procedure Code which is an express provision with regard to the trial of a case transferred by the High Court to itself from any other Criminal

Court other than the Court of a Presidency Magistrate. Reference should also be made to section 198-B of the Criminal Procedure Code which states :

" 198-B. (1) Notwithstanding anything contained in this Code, when any offence falling under Chapter XXI of the Indian Penal Code (XLV of 1860) (other than the offence of defamation by spoken words) is alleged to have been committed against the President, or the Vice-President, or the Governor or Rajpramukh of a State, or a Minister, or any other public servant employed in connection with the affairs of the Union or of a State, in respect of his conduct in the discharge of his public functions a Court of Session may take cognizance of such offence, without the accused being committed to it for trial, upon a complaint in writing made by the Public Prosecutor.

(2) Every such complaint shall set forth the facts which constitute the offence alleged, the nature of such offence and such other particulars as are reasonably sufficient to give notice to the accused of the offence alleged to have been committed by him.

(3).....

(4) No Court of Session shall take cognizance of an offence under sub-section (1), unless the complaint is made within six months from the date on which the offence is alleged to have been committed.

(5) When the Court of Session takes cognizance of an offence under sub-section (1), then, notwithstanding anything contained in this Code, the Court of Session shall try the case without a jury and in trying the case, shall follow the procedure prescribed for the trial by Magistrates of warrant cases instituted otherwise than on a Police report and the person against whom the offence is alleged to have been committed shall, unless the Court of Session, for reasons to be recorded otherwise directs, be examined as a witness for the prosecution.

..... "

There is no provision in the Criminal Procedure Code similar to section 198-B or section 526 (2) with respect to the mode of trial of the criminal cases which are transferred direct from the Court of the Magistrate to the Court of Additional Sessions Judge without an order of commitment being made. In the absence of any express provision it must be held that the Court of Additional Sessions Judge has no jurisdiction to proceed with the trial of a criminal case which has been transferred to it by the High Court.

If this view is right it follows that the High Court is not competent to transfer the criminal case from the file of the Sub-Divisional Magistrate's Court to that of the Additional Sessions Judge, Delhi under the provisions of section 526 (1) (ii) of the Criminal Procedure Code. The argument was stressed by Mr. Anand on behalf of the respondents that the language of section 526, Criminal Procedure Code, contained no limitation and that it was open to the High Court "to transfer any particular case from a Criminal Court subordinate to its authority to any other criminal Court of equal or superior jurisdiction." I do not consider that there is any justification for this argument. The language of section 526 (1) (ii) cannot be read in isolation and cannot be given effect to without regard to the mandatory provision of section 193 of the Criminal Procedure Code. On the contrary, the power of transfer given to the High Court under section 526 (1) (ii) must be so interpreted as not to conflict with the language of section 193, Criminal Procedure Code. In other words, the language of section 526 (1) (ii) must be restricted so as to be consistent with and be harmonious with the requirement of section 193 of the Criminal Procedure Code. I am accordingly of the opinion that the High Court had no power to transfer the criminal proceedings in the present case from the Court of the Sub-Divisional Magistrate to the Court of the Additional Sessions Judge without a proper order of commitment being made. The order of the learned Chief Justice of the Punjab High Court dated 13th March, 1964, is erroneous in law and must be accordingly set aside.

For the reasons expressed I set aside the order of the learned Chief Justice of the Punjab High Court dated 13th March, 1964, and in its place I direct that the criminal case filed by the appellant should be transferred to the Court of any other 1st Class Magistrate stationed at Delhi to be selected by the learned Chief Justice of the Punjab High Court under section 526 (1) (iv) of the Criminal Procedure Code. Criminal Appeals Nos. 86 and 88 of 1965 are accordingly allowed.

In view of this order Criminal Appeal No. 87 of 1965 has become infructuous and is accordingly dismissed

ORDER OF THE COURT —In accordance with the majority Judgment, the appeals stand dismissed

K S

*Appeals dismissed*

## THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT —K. SUBBA RAO J. R. MUDHOLKAR AND R. S. BACHAWAT, JJ.  
P. Mohammed Meera Lebbhai

*Appellant\**

Thirumalaya Gounder Ramaswamy Gounder and others

*Respondents*

*Travancore-Cochin High Courts Act (1949) (V of 1125 M.E.) sections 20 and 21—Suits valued in excess of Rs. 1,000 instituted in District Court when the Act was in operation—Provision that appeal valued in excess of Rs. 1,000 was to be heard by Bench of two Judges—Kerala High Courts Act (V of 1959) coming into force during pendency of appeal—Appeal if can be heard by single Judge as provided in section 5 of Act (V of 1959)*

Under Travancore Cochin Act 1949 (V of 1125 M.E.) sections 20 and 21 appeals valued in excess of Rs. 1,000 were to be heard by a Bench of two Judges. During the pendency of an appeal the Kerala High Courts Act (V of 1959) came into force and under it appeals valued at less than Rs. 10,000 could be heard by a single Judge. The appeal was accordingly heard by a single Judge. On appeal by Special Leave to the Supreme Court.

*Held* No right of appeal conferred on the appellant (when he filed his suit when Travancore Cochin Act 1949 (V of 1125 M.E.) was in force) was taken away by Kerala High Courts Act (V of 1959). An appeal lay to the High Court and in fact it was disposed of by the High Court and therefore no right of the appellant was infringed merely because it was heard by a single Judge and not by a Bench of two Judges as provided in the 1949 Act. Accordingly the appeal was rightly heard and decided by a single Judge. Once it is held that no party has a vested right to have his appeal to be heard by more than one Judge of the High Court, no right to prefer an appeal under Article 133 of the Constitution can be said to vest in him, the right under which being unavailable in case heard and disposed of by a single Judge of the High Court.

Appeal by Special Leave from the Judgment and Decree dated the 10th August, 1960 of the Kerala High Court in Appeals Suit Nos. 577 and 751 of 1958 and 40 of 1959.

T. A. Subramania Iyer, Senior Advocate, (M. S. K. Sastri and M. S. Naranman Advocates, with him), for Appellant.

A. I. Viswanatha Sastri, Senior Advocate, (S. V. Amyad Nair and R. Thangarajan Advocates, with him), for Respondent No. 1.

M. R. K. Pillai, Advocate, for Respondents Nos. 3, 4 and 5.

The Judgment of the Court was delivered by

Mudholkar J.—This is an appeal from a judgment of a single Judge of the Kerala High Court dismissing the appellant's suit for recovery of possession of certain property and for mesne profits. It is not disputed that the only question of law which arises in this appeal is whether the appeal could be heard and disposed of by a single Judge of the High Court. The other questions raised are purely questions of fact. Article 133 clause (3) of the Constitution clearly provides that notwithstanding anything in the article no appeal shall lie to the Supreme Court from a judgment, decree or final order of one Judge of a High Court unless Parliament by law otherwise provides. Parliament has passed no law rendering the judgment of a single Judge appealable to the Supreme Court. Though this provision does not detract from the power of this Court under Article 136 to entertain an appeal from a decision of a single Judge, it is the settled practice of this Court not to interfere with a finding of fact arrived at by the High Court unless it is satisfied

that in arriving at the finding of fact the High Court had been guilty of grave errors. We gave opportunity to learned Counsel to point out to us if the findings arrived at by the learned single Judge of the High Court are vitiated by any grave errors. But he was unable to point out any. We, therefore, declined to permit him to address us on the findings of fact.

As regards the question of law it is desirable to set out how, according to the appellant, it arises. The suit was instituted on 10th February, 1950, in the District Court of Kottayam which was later transferred by it to the Court of the Subordinate Judge, Meenachil sometime in the year 1956 and was substantially decreed in the appellant's favour on 30th July, 1958. Three appeals were preferred against it. One was by Tirumalaya Gounder, the first defendant, and another in January, 1959 by H. B. Mohammad Rowther, 8th defendant. The appellant had also preferred an appeal against that part of the decree which was adverse to him. All these appeals were heard together and disposed of by a common judgment on 10th August, 1960, and the appeals preferred by defendants 1 and 8 were allowed by the High Court while the appeal preferred by the appellant was dismissed. At the time the suit was instituted the Travancore-Cochin High Court Act V of 1125 M.E. (corresponding to 1949 A.D.) was in force. Under section 20 of that Act read with section 21 all appeals to the High Court valued at an amount in excess of Rs. 1,000 had to be heard by a Division Bench consisting of two Judges of the High Court. The appellant's suit and the appeals taken by the respondent from the District Court and the Subordinate Judge were both valued at Rs. 3,000 and therefore, had sections 20 and 21 of the Act been in force on the date on which the appeals were instituted unquestionably they would have had to be heard by a Division Bench of two Judges. The aforesaid Act, was, however, repealed by the Kerala High Court Act, 1958 being Act V of 1959 which received the assent of the President on 6th February, 1959, and came into force on 3rd March, 1959. The appeals were placed for hearing before a single Judge overruling, we are informed by learned Counsel, the appellant's plea that they should be only heard by a Division Bench. The reason why the appeals were heard by a single Judge and not placed before a Division Bench was that under section 5 of the Kerala High Court Act V of 1959 the jurisdiction of a single Judge of the High Court to hear and dispose of appeals from an original decree was extended to appeals in which the value of the subject-matter did not exceed Rs. 10,000. According to learned Counsel the right to have the appeal heard by a Division Bench conferred by the Travancore-Cochin High Court Act which was in force not only when the suit but also when the appeals were filed, was not taken away expressly by Kerala Act V of 1959 and could not be taken away by implication. In support of his contention he placed strong reliance upon the decision in *Radhakrishnan v. Sridhar*<sup>1</sup>. In that case, just as here, the jurisdiction of a single Judge to hear an appeal of a value over Rs. 2,000 was challenged, even though by an amendment to an earlier rule made by the High Court in exercise of its power under Clause 26 of the Letters Patent on 27th May, 1948, all appeals from an appellate decree of a District Court were to be ordinarily heard and disposed of by a single Judge. A contention was raised on behalf of the appellant's Counsel in that case that in the absence of any express provision rendering the amendment retrospective the amendment did not touch the right of an appellant which had accrued to him earlier to have his appeal heard by a Division Bench. The contention was upheld by the High Court. This decision was not approved of in *Mahendra v. Darsan*<sup>2</sup> on the ground that the right of a party to have an appeal heard by a Division Bench was merely a matter of procedure and could, therefore, be taken away retrospectively by implication. Learned Counsel for the appellant also placed reliance upon the decision of the Court in *Garikapati Veerava v. N. Subbaiah Choudhury*<sup>3</sup>, in which the following propositions were laid down.

1. I L R. 1950 Nag. 532 : A I R. 1950 Nag. 177 (F.B.).  
2. (1952) I L R. 31 Pat. 446.

3. (1957) S C J. 439: (1957) 2 M L J. (S C.) 1: (1957) 2 An.W.R. (S C.) 1 : (1957) S C R. 488

" (1) That the legal pursuit of a remedy *suit* appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding

(2) The right of appeal is not a mere matter of procedure but is a substantive right

(3) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit

(4) The right of appeal is a vested right and such a right to enter the superior Court accrues to the litigant and exists as on and from the date the *lis* commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal

(5) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise

and learned Counsel particularly laid stress on the third proposition. We are in respectful agreement with what has been laid down by this Court. But it is difficult to appreciate what benefit the appellant can obtain from what has been laid down by this Court. For this is not a case where any right of appeal conferred by law upon the appellant has been taken away. The right to prefer an appeal from the judgment of the Court of first instance is derived from the provisions of section 96 of the Code of Civil Procedure. The learned Counsel, however, contended that in the instant case it is traceable to the provisions of Travancore Cochin High Court Act of 1949. That Act as its Preamble shows was enacted for making provision regulating the business of the High Court of Travancore Cochin for fixing the jurisdiction of single Judges, Division Benches and Full Benches and for certain other matters connected with the functions of the High Court. It did not purport to confer a right of appeal on the parties, but merely dealt with procedural matters, matters which are dealt with by several High Courts under the Letters Patent. Even the Travancore Cochin Civil Courts Act, 1951 the provisions of which relate to civil Courts subordinate to the High Court does not confer any right of appeal though it divides civil Courts into four classes and defines their respective jurisdictions.

An objection somewhat similar to the one raised by the appellant before us was raised before this Court in *Itavira Mathai v Varkey Varkey and another*<sup>1</sup>. Dealing with it this Court has observed at page 514,

" That reason is that an appeal lay to a High Court and whether it is to be heard by one, two or a larger number of judges is merely a matter of procedure. No party has a vested right to have his appeal heard by a specified number of judges. An appeal lay to the High Court and the appeal in question was in fact heard and disposed by the High Court and therefore, no right of the party has been infringed merely because it was heard by two judges and not by three judges. No doubt in certain classes of cases as for instance cases which involve an interpretation as to any provision of the Constitution, the Constitution provides that the Bench of the Supreme Court hearing the matter must be composed of judges who will not be less than five in number. But it does not follow from this that the legal requirements in this regard cannot be altered by a competent body. We therefore overrule the contention of the learned Counsel and hold that the appeal was rightly heard and decided by a Bench of two judges."

In the circumstances, therefore, we must reject the appellant's contention based upon the decision in *Radhakrishnan's case*<sup>2</sup>.

Learned Counsel, however, contended that by depriving the appellant of the right to have his appeal heard by a Division Bench his further right of appeal to this Court under Article 133 was affected and that since that right also vested in him when he instituted the suit it could not be taken away retrospectively except by an express provision. There is a simple answer to this contention. The answer is that once it is held that no party has a vested right to have his appeal to be heard by more than one judge of the High Court, no right to prefer an appeal under Article 133 can be said to vest in him, the right under which being unavailable in case heard and disposed of by a single judge of the High Court. The argument of learned Counsel thus fails.

One more point was sought to be urged by learned Counsel for the appellant. The point is based upon the fact that one of the contesting respondents had raised

1 (1964) 1 S.C.R. 493, A.I.R. 1964 S.C. 907 177 (F.B.)

2 I.L.R. (1950) Nag 532, A.I.R. 1950 Nag

a question as to the maintainability of the suit. According to learned Counsel that person being in *pari delicto* with the plaintiff, ought not to have been permitted to raise that question. Since the point was not raised by the appellant in either of the two Courts below we declined to permit it to be raised for the first time before us.

For these reasons we dismiss the appeal with costs.

K. S.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT :—A. K. SARKAR, RAGHUBAR DAYAL AND V. RAMASWAMI, JJ.

Bharat Singh and others

.. *Appellants\**

v.

Mst. Bhagirathi

.. *Respondent.*

*Hindu Law—Joint family—Hindu brothers—Presumption of joint family—Severance—Onus of proof—Evidence Act (I of 1872), section 21—Admissions—Admissibility in evidence—Failure to confront under section 145 maker of such statement in witness box—Effect.*

There is a strong presumption in favour of Hindu brothers constituting a joint family. It is for the person alleging severance of the joint family to establish it.

The mere fact that mutation entry after the death of the father was made in favour of the three brothers and indicated the share of each to be one third by itself can be no evidence of the severance of the joint family which after the death of the father consisted of the three brothers who were minors. It is not for the Revenue Authorities to make any regular enquiry as to devolution of title. There was no reason why the three brothers should have separated just after the death of their fathers.

Admissions are substantive evidence by themselves. Admissions duly proved are admissible evidence irrespective of whether the party making them appeared in the witness box or not and whether that party when appearing as witness was confronted with those statements in case it made a statement contrary to those admissions.

The purpose of contradicting the witness under section 145 of the Evidence Act is very much different from the purpose of proving the admission. Admission is substantive evidence of the fact admitted while a previous statement used to contradict a witness does not become substantive evidence and merely serves the purpose of throwing doubt on the veracity of the witness. What weight is to be attached to an admission made by a party is a matter different from its use as admissible evidence.

Appeal from the Judgment and Decree dated the 9th November, 1959, of the Punjab High Court in Regular First Appeal No. 151 of 1954.

*Bishan Narain*, Senior Advocate, (*M. V. Goswami* and *B. C. Misra*, Advocates, with him), for Appellants.

*Mohan Behari Lal*, Advocate, for Respondent.

The Judgment of the Court was delivered by

*Raghubar Dayal, J.*—This appeal, on certificate, is against the judgment and decree of the Punjab High Court reversing the decree of the trial Court and dismissing the suit of the plaintiffs for a declaration that the entry in the name of the defendant in the Jamabandi papers of certain villages was incorrect.

The plaintiffs, Bharat Singh and Kirpa Ram, are the sons of Ram Narain. They had another brother Maha Chand, whose widow is Bhagirathi, the defendant. The plaintiffs alleged that they and Maha Chand constituted a joint Hindu family, that Maha Chand died as a member of the joint Hindu family and that thereafter Maha Chand's widow lived with the plaintiffs who continued to be the owners and possessors of the property in suit, the widow being entitled to maintain-

ance only. They also alleged that it was by mistake that the defendant's name was mutated in the village records in place of Maha Chand, who died on 16th September, 1925. They further alleged that the defendant lost her right to maintenance due to her leading an unchaste life. This contention, however, was not accepted by the Courts below and is no more for consideration. It was on the other allegations that the plaintiffs claimed a declaration that the entry of the defendant's name in the column of ownership in the Jamabandi papers was wrong, that they were the owners and possessors of the property in suit and that the defendant had no right therein. They also claimed a permanent injunction against the defendant restraining her from alienating or leasing any of the properties in favour of any person or causing interference of any kind in the possession of the plaintiffs.

The defendant contested the suit alleging that her husband Maha Chand, along with the plaintiffs did not constitute a joint Hindu family at the time of his death, that he was separate from the plaintiffs and that he was living separate from them, that the property in suit was neither ancestral property nor the property of the joint Hindu Family that the plaintiffs and Maha Chand were owners of agricultural land as co sharers, out of which one third share belonged to Maha Chand and that therefore the entry in her favour in the Jamabandi papers was correct. She also claimed right to Maha Chand's share on the basis of custom. This contention however, was not accepted by the Courts below and is not now open for consideration. Bhagurathi further contended that the suit was not within time as she had become owner and possessor of the land in suit in 1925. The suit was brought in 1951.

By their replication, the plaintiffs stated that Maha Chand had never become separate from them and that the defendant was not in possession of the property, in suit, the possession being with the plaintiffs or their tenants or lessees.

The trial Court held that the parties were governed by the Hindu law unmodified by any custom, that the joint Hindu family constituted by the plaintiffs and their brother Maha Chand was never disrupted and that Maha Chand died as a member of the joint Hindu family, that the property in suit was co-parcenary property in the hands of the three brothers, that the entry of the defendant's name in the Jamabandi was wrongly made and that the suit was instituted within time as the earliest the defendant asserted her claim to the land in suit was in 1950. The trial Court therefore granted the plaintiffs a decree for declaration in the following terms:

1. That the entries in the revenue papers showing the defendant as owner of one third share in the suit land are wrong and are not binding on the plaintiffs.

2. That the property in dispute vests in the plaintiff as coparceners.

3. That the defendant's only right in the suit property is one of maintenance and she is not entitled to alienate it in any way.

The plaintiffs are further granted a permanent injunction restraining the defendant from alienating the suit property in any way and from causing interference in the plaintiff's possession of the property.

The plaintiff's suit for declaration that the defendant has lost her right of maintenance in the suit property by unchastity is dismissed.

The defendant appealed to the High Court. It was not contended on her behalf that the land was ancestral and had descended from Ram Narain to the plaintiffs and Maha Chand. What was urged before the High Court was that the entry in Maha Chand's name as owner of one third share in the Jamabandi and similar entry in defendant's name after the death of Maha Chand was correct as irrespective of the fact whether the family was originally a joint Hindu family or not the joint Hindu family stood disrupted by the conduct of the parties and therefore there was no question of the plaintiff's getting the entire property by survivorship. Reliance was placed on the entries in the revenue records with respect to Maha Chand and the defendant after him owning one third share in those properties and about her possession upto 1946-47 and on the defendants

being impleaded in several suits by the plaintiffs as a co-plaintiff and in one suit as a defendant. The High Court considered this evidence sufficient to prove disruption of the joint family as the mutation entries in the revenue records could not have been obtained by the defendant surreptitiously or without the knowledge and consent of the plaintiffs and as none of the plaintiffs objected to her being entered as a co-sharer with them after the death of Maha Chand which showed that there was no joint Hindu family at the time of the death of Maha Chand. The High Court also relied on the fact that the plaintiffs had impleaded the defendant as a plaintiff or defendant in the various suits, as Bharat Singh refused or did not care to give an explanation why the defendant had been throughout shown as a co-sharer in those proceedings when actually she was not a co-sharer and was merely entitled to maintenance. The High Court did not use the admissions of Bhagirathi, defendant, in certain documents about the existence of the joint Hindu family or a joint Hindu family firm as she, when in the witness-box, was not confronted with those admissions and as those documents, if read as a whole, did not contain any admissions on behalf of Bhagirathi that there was any joint family still in existence. The High Court summed up its view on the question of disruption in the family thus :

"These revenue entries normally do not furnish a very strong evidence of severance of a joint Hindu family but subsequent conduct of the plaintiffs, as detailed above, leaves no manner of doubt that there did not exist any joint Hindu family after the demise of Ram Narain and that Mst. Bhagirathi was rightly shown as a co-sharer in the revenue records."

The High Court considered the case to have been instituted after the expiry of the period of limitation but did not base its decision on this finding. The High Court, accordingly, allowed the appeal and set aside the decree of the trial Court in favour of the plaintiffs.

The sole question for determination in this Court is whether the plaintiffs and Maha Chand constituted a joint Hindu family at the time of the latter's death. Having considered the evidence on record and the submissions made on behalf of the parties, we are of opinion that the trial Court took a correct view of the evidence on record. There is a strong presumption in favour of Hindu brothers constituting a joint family. It is for the person alleging severance of the joint Hindu family to establish it. It is to be noticed in the present case that the defendants did not state in the written statement as to when disruption took place in the joint family. The High Court too has not given any clear-cut finding with regard to the time when disruption took place in the joint family. The way it has expressed itself indicates that no joint Hindu family existed after the death of Ram Narain, father of the plaintiffs and Maha Chand. There is nothing in the judgment of the High Court as to when severance of the Hindu joint family took place. The mere fact that mutation entry, after the death of Ram Narain was made in favour of three brothers and indicated the share of each to be one-third, by itself can be no evidence of the severance of the joint family which, after the death of Ram Narain, consisted of the three brothers who were minors. Ram Narain died in 1923. Maha Chand died in 1925 and is said to have been about 17 or 18 years of age then. The plaintiffs were of even less age at that time. There was no reason why just after the death of Ram Narain the three brothers should have separated.

It is true, as the High Court observes, that Bhagirathi could not have manipulated the mutation entries after the death of Maha Chand surreptitiously. It is not alleged by the plaintiffs that she got the entries made wrongly in her favour by some design or undesirable means. There is however nothing surprising if the mutation entry had been made without the knowledge of the appellants who were minors at the time. Their minority will also explain the absence of any objection to the mutation being made in her favour. The way in which the mutation entry was made does not indicate that the mutation entry was made after notice to the plaintiffs or their guardian, whoever he might have been at the time, or after any statement on their behalf that they had no objection to the entry. Exhibits D-7 and D-8 are the extracts from the Register of Mutations



relating to mauza Asoda Todran Jamnan Hadbast No 28 Tehsd Jhajar, District Rohtak The entries in column 15 show that the Patwari of the village reported on 30th November 1925, that Munshu Lal Mahajan had informed him that Maha Chand had died and that Mst Bhagirathi was in possession of the property of the deceased as heir that mutation by virtue of succession had been entered in the register and the papers were submitted for proper orders The Revenue Assistant passed an order on 29th December, 1925 which is in the following terms

Bahadurgarh Public Assembly

#### ORDER

Ramj Lal Lambardar test fied in the factums of the death of Maha Chand and the succession (to him) of Mst Bhag ratl his widow There is no objector Hence mutation in respect of the heritage of Maha Chand n favour of Mst Bhag ra h s widow is sanct oned

Dated the 29th December 1925

Signature of —

The Revenue Assistant.

The order shows that it was made as a result of there being no objection from any body to the statement of Ramj Lal Lambardar about the death of Maha Chand and Bhagirathi succeeding him as widow The plaintiffs who were minors may not have attended the Public Assembly They being minors could not have understood the significance of any general notice if any issued in that connection and the gathering of people It is not for the Revenue Authorities to make any regular enquiry about the devolution of title They make entries for revenue purposes about the person who is considered *prima facie* successor of the deceased A widow would be considered an ostensible successor to her husband unless it be known that her husband was a member of a joint Hindu family and the property over which mutation was to be made was joint family property

We are therefore of opinion that the mere fact of the mutation entry being made in favour of Bhagirathi on the death of Maha Chand is no clear indication that there was no joint Hindu family of the plaintiffs and Maha Chand at the time of the latter's death

Bharat Singh appellant No 1 instituted 5 suits on behalf of himself Kirpa Ram and Bhagirathi All these suits related to agricultural land D 1 D 2 D-3 and D-4 the plaintiffs in four of these suits were in the name of the plaintiffs and Bhagirathi and it was stated in them that the plaintiffs were the proprietors of the agricultural land in suit With respect to the admission in these plaintiffs that Bhagirathi was one of the proprietors Bharat Singh stated that he had been including her name in the cases filed against tenants in accordance with the revenue papers This is a sound explanation So long as an entry in the defendant's name stood in the revenue papers suits in revenue Courts as these suits were had to be filed in those names D 5 is the plaint of a suit by Bharat Singh and Kirpa Ram instituted on 6th April 1943 Bhagirathi is impleaded as defendant No 1 Para 1 of the plaint stated that defendants Nos 2 to 5 were non-occupancy tenants under the plaintiffs and defendant No 1 and para 3 stated that defendant No 1 being absent could not join the suit and that therefore she had been made a *pro forma* defendant When Bharat Singh made the statement on 27th November, 1953 'I do not remember why Bhag rathi was made defendant, he does not appear to have been shown the plaint Exhibit D 5 There is nothing surprising if he could not remember the reason for making her a defendant Earlier he had already made statement on 3rd October, 1953 that they had been including her name in the cases filed against tenants in accordance with revenue papers and that explanation, together with what is entered in the plaint sufficiently explains for Bhagirathi being impleaded as defendant in D 5 The High Court was not factually correct in making the following observation

"When Bharat Singh came into the witness-box, he was confronted with all these documents but strangely enough he did not care to give any explanation why Mst. Bhagirathi had throughout been shown as a co-sharer with them in these proceedings if in fact she was not a co-sharer and was entitled

only to maintenance. As a matter of fact, when a pointed question was asked from him with regard to Exhibit D-5, he stated as follows :—“ I do not remember why Mst. Bhagirati was made a defendant.”

Bharat Singh had given explanation with respect to her being impleaded in these suits. The record does not show that he was referred to Exhibit D-5 and a pointed question with regard to what was stated in the plaint had been put to him when he made the particular statement about his not remembering why Mst. Bhagirati was made a defendant. If he had been referred to the plaint, he could have himself, on reading, given the proper answer, or his Counsel would have re-examined him in that regard.

We are of opinion that the High Court was in error in relying on these admissions of Bharat Singh when he had explained them reasonably.

The oral evidence adduced for the defendant to prove separation of Maha Chand from his brothers, has been rightly described to be worthless by the trial Court. No reliance on that evidence was placed on behalf of the respondent in the High Court. The evidence consists of the statements of three persons. Munshi Ram, D.W. 1, brother of defendant, who was about 10 years old when Maha Chand died, simply states that at the time of Maha Chand's death, he was separate from his brothers. He admitted in cross-examination that this he had learnt from his father. His evidence is hearsay and is of no value.

Giani Ram, D.W. 3, stated that all the three brothers, Bharat Singh, Kirpa Ram and Maha Chand had separated in 1923 during the lifetime of Ram Narain himself. The finding of the High Court is that the disruption of the joint family took place after Ram Narain's death. Giani Ram does not belong to the family. No reason exists why disruption of family should have taken place in the lifetime of Ram Narain. The fact that Ram Narain or his mother are not said to have got any share of the agricultural land when disruption took place, does not stand to reason. No mutation entry appears to have been made in the village papers at the time of the alleged partition in the lifetime of Ram Narain. Giani Ram is much interested in the case of the defendant as he holds a decree against her. Further, firm Shiv Prasad Giani Ram sued firm Jairam Das Ram Narain (the family firm of the parties herein) through Bhagirati for the recovery of the money the defendant firm owed to the plaintiff firm on the basis of bahikhatha accounts. Giani Ram through whom the suit was instituted, and Bhagirati entered into an agreement for referring this dispute to arbitration. In this agreement signed by Giani Ram and Bhagirati, she was described as proprietrix of the joint Hindu firm known as Jairam Das Ram Narain. The only explanation for such a statement occurring in the agreement is given by him to be that the petition-writer did not read over the agreement to him or to Bhagirati and got their signatures on it without making them read the agreement. No reliance could have been placed on his statement.

Bhagirati, defendant, as D.W. 4, simply stated that when her husband died he and the plaintiffs were not joint and that they had separated even before her marriage. She is no witness of the disruption of the family.

We are therefore of opinion that the evidence relied on by the High Court for holding the disruption proved together with the oral evidence led by the defendant about disruption of the family is insufficient to prove disruption after the death of Ram Narain and during the life time of Maha Chand.

It is not necessary to discuss the evidence for the plaintiffs about the family being joint when Maha Chand died. Suffice it to say that apart from the statement of Bharat Singh, P.W. 7, there is other evidence to establish it. Shiv Narain, P.W. 4, deposed that when Ram Narain was alive he and his brothers constituted a joint Hindu family upto the death of Maha Chand and that the joint family continued upto the date he gave evidence. He was not cross-examined with regard to his statements. Jai Lal, P.W. 5, deposed to the same effect. In cross-examination he stated that had there been a son of Maha Chand, he would have got one-third share of Maha Chand and that all the three brothers had one-third share each in the property. This statement does not mean that there had been disruption in the family. We do not know in what form the questions to which

these are the answers were put. The answers are consistent with the fact that had separation taken place during the lifetime of Maha Chand, his share would have been one-third and that his one third share would have gone to his son or that the entries in the village papers would show Maha Chand's son being mutated or the one third share of Maha Chand just as Bhagirati's name was mutated in place of Maha Chand.

Reliance was also placed for the plaintiffs on the admissions of Bhagirati. The High Court did not take these admissions into consideration as they were not put to her when she was in the witness box and as in its opinion the documents containing the alleged admissions if read as a whole did not contain any admissions on behalf of Bhagirati that there was any joint family still in existence.

The legal objection to the consideration of these admissions was based on the Full Bench decision of the Punjab High Court in *Firm Malik Des Raj v. Firm Piar Lal*<sup>1</sup>. The view taken in that case was referred to by the Full Bench decision of the Allahabad High Court in *Ajodhya Prasad v. Bhawani Shanker*<sup>2</sup>. The Punjab High Court based its decision on the observations of the Privy Council in *Bal Gangadhar Tilak v. Shrinivas Pandit*<sup>3</sup>. That case however, did not directly deal with the use of admissions which are proved but are not put to the person making the admissions when he enters the witness box. The entire tenor of the documents whose certain contents were construed by the High Court to discredit the persons making those admissions went to support their case and did not in any way support the case of the other party. The Privy Council expressed its disapproval of the High Court minutely examining the contents of the documents and using its own inferences from those statements to discredit the oral statements of the persons responsible for making those documents when those persons had not been confronted with those statements in accordance with section 145 of the Indian Evidence Act.

Admissions have to be clear if they are to be used against the person making them. Admissions are substantive evidence by themselves, in view of sections 17 and 21 of the Indian Evidence Act, though they are not conclusive proof of the matters admitted. We are of opinion that the admissions duly proved are admissible evidence irrespective of whether the party making them appeared in the witness box or not and whether that party when appearing as witness was confronted with those statements in case it made a statement contrary to those admissions. The purpose of contradicting the witness under section 145 of the Evidence Act is very much different from the purpose of proving the admission. Admission is substantive evidence of the fact admitted while a previous statement used to contradict a witness does not become substantive evidence and merely serves the purpose of throwing doubt on the veracity of the witness. What weight is to be attached to an admission made by a party is a matter different from its use as admissible evidence.

We are therefore of opinion that the admissions of Bhagirati which had been duly proved could be used against her. They were proved long before she entered the witness box and it was for her to offer any explanation for making those admissions. The Court could have considered the effect of her explanation. She preferred to make no reference to her admissions proved by the plaintiffs. Her simple statement that her husband had separated from his brothers even before her marriage, is, by itself, neither an adequate explanation of those admissions nor a clear-cut denial of the fact admitted.

We have already referred to her admission in the agreement executed by her and Giani Ram for referring the dispute in Giani Ram's suit for arbitration in 1916. She instituted a suit earlier in 1914. The plaint of that suit is Exhibit P 2. She instituted this suit against the present plaintiffs and stated in para 1 of the plaint that those defendants and Maha Chand, her husband, were members of a joint Hindu family and in para. 2 that in place of her husband Maha Chand she was

1 A.I.R. 1946 Lah. 65 (F.B.)  
2 A.I.R. 1957 All. 1 (F.B.)

3 (1915) L.R. 42 I.A. 133 29 M.L.J. 31-  
17 Bom.L.R. 527

then the co-sharer and owner and possessor of the property of his share and that in this way the plaintiff and the two defendants were members of the joint Hindu family. In para. 3 she stated that the joint Hindu family mentioned in para. 1 held the property mentioned therein and this property included residential property and the business of two firms. She further stated in para. 4 that defendants 1 and 2, the present plaintiffs, were running the business of the firms in the capacity of managers and that she did not want to keep her share joint in future. She had instituted the suit for partition of the property and the firms mentioned in para. 3.

P.W. 2, clerk of Shri Inder Singh Jain, pleader, scribed this plaint and had deposed that the pleader had prepared the brief in accordance with the instructions of Bhagirati and that he had written out the petition and plaint and that it had been read out to her. He denied that the thumb marks of Bhagirati were secured on a plain paper and that the plaint was written later on. This suit was withdrawn.

Again, in 1950, she instituted another suit against the present plaintiffs and one Har Narain, for a certain declaration. In para. 1 of the plaint it was stated that the three shops mentioned therein belonged to the joint Hindu family firm Jairam Das Ram Narain in Narela Mandi, Delhi State. The plaint is Exhibit P-1. Shri M.K. Madan, Advocate, P.W. 1, has deposed that the plaint was got written by Bhagirati, that a portion of the plaint was in his handwriting and that it was read over to her and that she put her thumb mark on it after having heard and admitted its contents. He also stated that the suit was subsequently withdrawn.

We are of opinion that the evidence of the plaintiffs on record establishes that there had been no disruption between the plaintiffs, and Maha Chand and that Maha Chand died as a member of the joint Hindu family. It follows that the entries in the Jamabandis showing Bhagirati as the owner of one-third share are wrong and that the decree of the trial Court is right.

The question of limitation may be briefly disposed of. There is no good evidence on record to establish that the respondent, prior to 1950, asserted that she had any right adverse to the plaintiffs over the property in suit or that she acted in any manner which would amount to an ouster of the plaintiffs. Admittedly the dispute between the parties arose sometime in 1944. Prior to that there could be no reason for her acting adversely to the interests of the plaintiffs. It was really in about 1950 that she leased certain properties and transferred certain plots and soon after the plaintiffs instituted the suit. The suit is clearly not barred by limitation.

We therefore allow the appeal, set aside the decree of the Court below and restore the decree of the trial Court. We further direct the respondent to pay the costs of the appellants in the High Court and this Court.

K.S.

*Appeal allowed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, M. HIDAYA-TULLAH, J. C. SHAH AND S. M. SIKRI, JJ.

The State of West Bengal and another

.. *Appellants\**

*v.*

Nripendra Nath Bagchi

.. *Respondent.*

Sukhdev Singh Sodhi and others

.. *Interveners.*

*West Bengal Service Rules, Rule 75 (a) modelled or rule 56 (a) of Fundamental Rules but having no rule corresponding to rule 56 (d) of the Fundamental Rules—Scope—Retention in service after superannuation merely for purpose of suspension and departmental enquiry—Propriety.*

*Constitution of India (1950), Article 235—District Judge—Is subject to "control" of the High Court—"Control"—Includes disciplinary jurisdictions.*

*Rule 75 (a) of the West Bengal Service Rules (modelled on rule 56 (a) of Fundamental Rules but having no rule corresponding to rule 56 (d) of the Fundamental Rules) is intended to be used to keep in*

employment persons with a meritorious record of service, who although superannuated, can render some more service and whose retention in service is considered necessary on public grounds. The language of the rule hardly suits retention for purpose of departmental enquiries. Extension of service under rule 75 (a) merely for purpose of suspension and departmental enquiry is illegal.

In the case of District Judges appointments of persons to be and posting and promotion are to be made by the Governor but the control of the District Judge is in the High Court under Article 235 of the Constitution. The power of posting, promotion and grant of leave and the 'control' of the Courts are vested in the High Court. What is vested includes disciplinary jurisdiction. By vesting control in the High Court the independence of the judiciary was in view. There is nothing in Article 311 which compels the conclusion that the High Court is ousted of the jurisdiction to hold the enquiry if Article 235 vested such a power in it. The High Court alone could have held the enquiry in the instant case and the removal from service was thus illegal.

Appeal from the Judgment and Order dated the 1st July, 1960 of the Calcutta High Court in Civil Rule No 520 of 1955

*C K Daphtary*, Attorney-General for India and *B Sen*, Senior Advocate (*S C Bose and P K Bose*, Advocates, with them), for Appellants

*N C Chatterjee*, Senior Advocate (*Sukumar Ghose*, Advocate for *S C Mazumdar*, Advocate, with him), for Respondent

*B R L Iyengar*, *S K Mehta* and *K L Mehta*, Advocates, for Intervener No 1 (*Sukdev Singh Sodhi*)

*Arun B Saharya* and *Sardar Bahadur*, Advocates, for Intervener No 2 (*Murtaza Khan*)

*Naunit Lal*, Advocate, for Intervener No 3 (*A. G. , State of Assam*)

*S V Gupte*, Solicitor-General of India (*B R G K Achar*, Advocate, with him), for Intervener No 4 (*A. G. , State of Maharashtra*)

*N Krishnaswamy Reddy*, Advocate-General for the State of Madras (*A I Rangam*, Advocate, with him), for Intervener No 5 (*State of Madras*)

*D Sahu*, Advocate-General for the State of Orissa (*B P. Jha* and *R N Sachthy*, Advocates, with him), for Intervener No 6 (*State of Orissa*)

*R. N. Sachthy*, Advocate, for Intervener No 7 (*A. G. , State of Rajasthan*)

*Hardeo Singh*, Advocate, for Intervener No 8 (*C J. , High Court of Orissa*)

The Judgment of the Court was delivered by

*Hidayatullah, J.*—This is an appeal by the State of West Bengal and its Chief Secretary against the judgment of the Calcutta High Court dated 1st July, 1960, by which the order dismissing *N N Bagchi* (the respondent) from service was quashed. The High Court certified the case as fit for appeal to this Court under Articles 132 (1) and 133 (1) (c) of the Constitution.

*N N Bagchi* was appointed a Munsif on 10th November, 1927. After promotions he became an Additional District and Sessions Judge and officiated at several stations as District and Sessions Judge but he was never confirmed as such. He last acted as a District and Sessions Judge at Birlahum in March, 1953. In April of the same year he was transferred to Alipore as an Additional District and Sessions Judge. In the ordinary course *Bagchi* was due to superannuate and retire on 31st July, 1953. On 17th April, 1953 he applied for leave from 27th April 1953 to 31st July, 1953 preparatory to retirement. The leave was held inadmissible. He was however, granted leave from 17th July, 1953 to the end of his service *Bagchi*, however, reported on 27th April, 1953 that he had gone to Puri on 25th April 1953 because his son was ill and asked for one month's leave from 27th April, 1953. Leave for 3 weeks was granted which, at his request, was extended to 5th June, 1953.

By an order dated 14th July, 1953 Government ordered that *Bagchi* be retained in service for a period of two months commencing from 1st August, 1953. The order reads:

"I am directed to state that Government have been pleased to sanction under Rule 75 (a) of the West Bengal Service Rules. Part I, the retention in service of Nripendra Nath Bagchi. Additional District and Sessions Judge, 24-Parganas for a period of two months with effect from 1st August, 1953, the date of his compulsory retirement, in the interest of the public service."

Rule 75 (a) which was invoked reads as follows :—

Rule—75 (a). Except as otherwise provided in this rule, the date of compulsory retirement of a Government servant other than a member of the clerical staff or a servant in inferior service is the date on which he attains the age of 55 years. He may, however be retained in service beyond that date with the sanction of Government on public grounds which should be recorded in writing ; but he shall not be retained after attaining the age of 60 years except in very special circumstances."

By another order dated 20th July, 1953, Bagchi was placed under suspension and on the following day he was served with 11 charges and was asked to file a written reply within 15 days. An enquiry into these charges followed and it was entrusted to Mr. B. Sarkar, I.C.S., Commissioner (later Member, Board of Revenue) by the Government of West Bengal. The enquiry continued for a long time and Bagchi was retained in service, though kept under suspension, by repeated orders of different durations under rule 75 (a). Mr. Sarkar made his report to the Government on 21st December, 1953 holding that some of the charges were proved. He did not recommend any punishment as he thought that punishment would depend upon Bagchi's record of service. On 18th March, 1954 Bagchi was asked to show cause why he should not be dismissed from service and after he had shown cause he was dismissed on 27th May, 1954. The Public Service Commission was consulted but not the High Court. He appealed to the Governor unsuccessfully. On 15th February, 1955 he applied to the High Court at Calcutta under Articles 226 and 227 of the Constitution against his dismissal and a rule was issued. On the recommendation of Mr. Justice D.N. Sinha, the case was placed before a Full Bench as important questions of constitutional law were involved. The Full Bench by its judgment dated 1st July, 1960 made the rule absolute and quashed the order of dismissal as well as the enquiry. On the application of the Government of West Bengal the High Court certified the case as fit for appeal to this Court and the present appeal was filed. At an earlier hearing this Court ordered that notices be issued to all the Advocates-General of the States and to the High Courts because the questions involved were of considerable general and constitutional importance. In answer to the notices some of the States and the High Courts intervened arguing either in favour of or against the judgment under appeal. While making his recommendation D.N. Sinha, J., drew up the points of controversy in the case. They may be set down here :

"(1) That the provisions of Rule 75 (a) of the West Bengal Service Rules have not been complied with.

(2) That the service of a civil servant cannot be extended merely for the purpose of dismissal.

(3) That the control over the District Courts and the Courts Subordinate thereto are vested with the High Court under Article 235 of the Constitution, and the authority competent to take disciplinary proceedings and action against the petitioner or to deal with in any way was the High Court and not any other authority.

(4) That the provisions of the Civil Service (Control, Classification and Appeal) Rules in so far as they authorise any authority other than the High Court to take disciplinary action against the person holding the post of petitioner are *ultra vires* and void under Article 235 of the Constitution.

(5) That, in any event, the entire departmental enquiry and proceedings have been conducted in violation of the principle of natural justice."

At the final hearing this appeal was confined to the first three points. The fourth point and the allegations about denial of natural justice were not discussed. The three points may be summarized into two : (1) whether the enquiry ordered by the Government and conducted by an Executive Officer of the Government against a District and Sessions Judge contravened the provisions of Article 235 of the Constitution which vests in the High Court the control over the District Court and the Courts subordinate thereto ; and (2) whether the provisions of rule 75 (a) West Bengal Service Rules could be utilized to extend the service of Bagchi beyond the normal age of retirement. On hearing arguments we are

satisfied that the answer to both the questions must be against the Government. We shall now proceed to give our reasons.

We may begin with Rule 75 (a) because that question, although not so important as the other, causes less trouble. The rule, which was earlier set out, may be compared with rules 56 (a) and 56 (d) of the Fundamental Rules—

"56 (a) Except as otherwise provided in the other Clauses of this Rule the date of compulsory retirement of a Government servant other than a munstonsal servant is the date on which he attains the age of 55 years. He may be retained in service after the date of compulsory retirement with the sanction of the Local Government on public grounds which must be recorded in writing but he must not be retained after the age of 60 years except in very special circumstances."

"56 (d) Notwithstanding anything contained in clauses (a), (b) and (c) a Government servant under suspension on a charge of mis conduct shall not be required or permitted to retire on reaching the date of compulsory retirement but shall be retained in service until the enquiry into the charge is concluded and a final order is passed thereon by competent authority."

It was conceded in the High Court that Rule 56 (a) of the Fundamental Rules framed under section 96 B of the Government of India Act did not apply to District and Sessions Judges. The West Bengal Service Rules were made by the Governor under section 241 of the Government of India Act, 1935 and they were made applicable to the services of the Government of West Bengal. When the West Bengal Service Rules were made the Fundamental Rules were available. Rule 75 (a) was modelled on Rule 56 (a) of the Fundamental Rules but no rule like Rule 56 (d) which we have quoted was included. Under section 276 of the Government of India Act, 1935 the West Bengal Service Rules would prevail over the Fundamental Rules and it is conceded that they alone govern this case. Even if Rule 56 (d) of Fundamental Rules was available it was not utilized. Repeated orders were passed under rule 75 (a), West Bengal Service Rules and these orders said that the retention of Bagchi was in the interest of public service. Rule 75 (a) is hardly designed to be used for this purpose. It is intended to be used to keep in employment persons with a meritorious record of service who, although superannuated, can render some more service and whose retention in service is considered necessary on public grounds. This meaning is all the more clear when we come to the end of the rule where it is stated that a Government servant is not to be retained after he attains the age of sixty years except in very special circumstances. This language hardly suits retentions for purposes of departmental enquiries.

Mr Justice P B Mukherji pointed out very appositely the contrast between rule 56 (a) and (d) of the Fundamental Rules. Rule 56 (a) corresponds to rule 75 (a) but rule 56 (d) opens with the words 'notwithstanding anything contained in clause (a)' (of Rule 56). This shows that they cover different situations and the matters in Rule 56 (d) do not cover matters in Rule 56 (a). In dealing with the application of the rules the learned Judge observed.

"No consent of the petitioner for retaining his service was called for or obtained. The two expressions in the above order (1) 'Retention in Service' and (2) 'in the interest of public service' do not on the facts of this case mean what they say. Here 'retention in service' means suspension from service because from the date when he was retained in service he was suspended from service. The other expression 'the interest of the public service' does not mean actual service to the public but meant only departmental enquiry against him. His service was extended from time to time with a view to enable the Government to start and conclude the departmental enquiry against him during which the petitioner was allowed to live on a bare subsistence allowance."

We find it sufficient to say that we agree that the retention of Bagchi in service under rule 75 (a) for the purpose of enquiry was not proper and the extension of the service was illegal.

We now come to the next question whether Government or the High Court should order, initiate, and hold enquiries into the conduct of District Judges. This problem would not have arisen if there was no special provision for District Judges in the Constitution in Chapter VI entitled "Subordinate Courts" immediately after Chapter V which deals with the High Court in the States. Chapter VI consists of five articles Nos 233 to 237. The last article in this list merely

provides for the application of the provisions of this Chapter to Magistrates in the State as they apply in relation to persons appointed to the Judicial Service of the State subject, however, to such exceptions and modifications as may be specified. The expression "judicial service" is defined in the preceding Article 236 (b) and it means service consisting exclusively of persons intended to fill the post of District Judge and other civil judicial posts inferior to the post of District Judge. The word "District Judge" is also defined in the same article by clause (a) and it includes, among others, an additional District Judge. The other three articles are important and the relevant parts may be set out here.

"233. *Appointment of District Judges.*—(1) Appointments of persons to be, and the posting and promotion of, District Judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

(2)

\* \* \* \* \*

"234. *Recruitment of persons other than District Judges to the judicial service.*—Appointments of persons other than District Judges to the judicial services of a State shall be made by the Governor of the State in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State."

235. *Control over Subordinate Courts.*—The control over district Courts and Courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of District Judge shall be vested in the High Court, but nothing in this article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law."

These articles deal with the appointments of the persons to be, and postings and promotions of District Judges and appointment, postings under promotions of Judges subordinate to the District Judge and the control over the District Court and the Courts subordinate thereto. They also provide for special rules to be made by the Governor of the State after consultation with the State Public Service Commission and the High Court exercising jurisdiction in relation to each State. This group of articles is intended to make special provision for the judicial service of the State. What it intends to do is, of course, the bone of contention between the parties. To understand why this special Chapter was necessary when there is Part XIV dealing with Services under the Union and the States, it is necessary to go into a little history of this constitutional provision. Before we set down briefly how this Chapter came to be enacted outside the Part dealing with Services and also why the articles were worded, as they are, we may set down the corresponding provisions of the Government of India Act, 1935. There too a special provision was made in respect of judicial officers but it was included as a part of Chapter II of Part X which dealt with the Civil Services under the Crown in India. The cognate sections were sections 254 to 256 and they may be reproduced here :

"254. *District Judges etc.*—(1) Appointments of persons to be, and the posting and promotion of, District Judges in any Province shall be made by the Governor of the Province, exercising his individual judgment, and the High Court shall be consulted before a recommendation as to the making of any such appointment is submitted to the Governor.

(2) A person not already in the service of His Majesty shall only be eligible to be appointed a District Judge if he has been for not less than five years a barrister, a member of the Faculty of Advocates in Scotland, or a pleader and is recommended by the High Court for appointment.

(3) In this and the next succeeding section the expression "District Judge" includes Additional District Judge, Joint District Judge, Assistant District Judge, Chief Judge of a Small Cause Court, Chief Presidency Magistrate, Sessions Judge, Additional Sessions Judge, and Assistant Sessions Judge."

255. *Subordinate civil judicial service.*—(1) The Governor of each Province, shall, after consultation with the Provincial Public Service Commission and with the High Court, make rules defining the standard of qualifications to be attained by persons desirous of entering the subordinate civil judicial service of a Province.



In this section, the expression "subordinate civil judicial service" means a service consisting exclusively of persons intended to fill civil judicial posts inferior to the post of District Judge

(2) The Provincial Public Service Commission for each Province, after holding such examinations if any, as the Governor may think necessary, shall from time to time out of the candidates for appointment to the subordinate civil judicial service of the Province make a list or lists of the persons whom they consider fit for appointment to that service and appointments to that service shall be made by the Governor from the persons included in the list or lists in accordance with such regulations as may from time to time be made by him as to the number of persons in the said service who are to belong to the different communities in the Province

(3) The posting and promotion of and the grant of leave to, persons belonging to the subordinate civil judicial service of a Province and holding any post inferior to the post of District Judge shall be in the hands of the High Court, but nothing in this section shall be construed as taking away from any such person the right of appeal required to be given to him by the foregoing provisions of this chapter, or as authorising the High Court to deal with any such person otherwise than in accordance with the conditions of his service prescribed thereunder

256 *Subordinate criminal magistracy*—No recommendation shall be made for the grant of magisterial powers or of enhanced magisterial powers to, or the withdrawal of any magisterial powers from, any person save after consultation with the District Magistrate of the district in which he is working or with the Chief Presidency Magistrate, as the case may be

It may be pointed out at once that in the present Constitution these provisions have been lifted from the Chapter dealing with Services in India and placed separately after the provisions relating to the High Courts of the States

As far back as 1912 the Islington Commission stated that the witnesses before the Commission demanded two things (1) recruitment from the Bar to the superior judicial service, namely, the District judgeship, and (2) the separation of the judiciary from the executive. The Commission stated in its report "Opinion in India is much exercised on the question of the separation of the executive and the judicial functions of the officers" and observed that "to bring this about legislation would be required". The Commission made its report on 14th August 1915 a few days after the Government of India Act, 1915 (5 & 6 Geo V, c 61) was enacted. The Act did not, therefore, contain any special provision about the judicial services in India. The World war I was also going on. In 1919 Part VII A consisting of sections 96 B to 96 E was added in the Government of India Act, 1915. Section 96 B provided that every person in the Civil Service of the Crown in India held office during His Majesty's pleasure but no person in that service might be dismissed by any authority subordinate to that by which he was appointed. The only section that concerns us is section 96 B. Sub section (2) of that section reads as follows:

"(2) The Secretary of State in Council may make rules for regulating the classification of the civil service in India, the methods of their recruitment, their conditions of service, pay and allowances, and discipline and conduct. Such rules may, to such extent and in respect of such matters as may be prescribed, delegate the power of making rules to the Governor-General in Council or to local Governments or authorise the Indian Legislature or local legislature to make laws regulating the public services."

The Fundamental Rules and the Civil Services (Classification, Control and Appeal) Rules were made by the Secretary of State in Council under the above rule making power. These rules governed the judicial services except the High Court. Part IX of the Government of India Act dealt with the Indian High Courts, their constitution and jurisdiction. Section 107 gave to the High Courts superintendence over all Courts for the time being subject to its appellate jurisdiction and enumerated the things the High Court could do. They did not include the appointment, promotion, transfer or control of the District Judges. High Courts could only exercise such control as came within their superintendence over the Courts subordinate to their appellate jurisdiction. In the Devolution Rules, item 17 in Part II dealing with the Provincial subjects read as follows:—

"Administration of justice, including constitution, powers, maintenance and organisation of civil Courts and criminal jurisdiction within the Province, subject to legislation by the Indian Legislature as regards High Courts, Chief Courts, and Courts of Judicial Commissioners and any Courts of criminal jurisdiction."

It would thus appear that the problem about the independence of judicial officers, which was exercising the minds of the people did not receive full attention and to

all intents and purposes the Executive Government and Legislatures controlled them. The recommendations of the Islington Commission remained a dead letter. When the Montague-Chelmsford enquiry took place the object was to find out how much share in the legislative and executive fields could be given to Indians. The post of the District Judge was previously reserved for Europeans. The disability regarding Indians were removed as a result of the Queen's Proclamation in 1870 and Rules were framed first in 1873. In 1875 Lord Northbrook's Government framed Rules allowing Indians to be appointed and Lord Lytton's Government framed Rules fixing 1/5th quota for the Indians. There was no fixed principle on which Indians were appointed and the report of the Public Service Commission presided over by Sir Charles Aitchison in 1886 contains the system followed in different Provinces. This continued down to 1919. The Government of India Act had introduced Dyarchy in India and the question of control of services in the transferred field was closely examined when the Government of India Act, 1935 was enacted. It was apprehended that if transference of power enabled the Ministers to control the services, the flow of Europeans to the Civil Services would become low. Government appointed several Committees, chief among them the Mac Donnell Committee considered the position of the Europeans *vis-a-vis* the services. There was more concern about Europeans than about the independence of the judiciary.

The Indian Statutory Commission did not deal with the subject of judicial services but the Joint Committee dealt with it in detail. It is interesting to know that the Secretary of State made a preliminary statement on the subject of subordinate civil judiciary and his suggestion was "to leave to the Provincial Legislatures the general power" but to introduce in the Constitution "a provision which would in one respect override those powers, namely, a provision vesting in the High Courts, as part of their administrative authority, power to select the individuals for appointment to the Civil Judicial Services, to lay down their qualifications, and to exercise over the members of the service the necessary administrative control." He said that "the powers of the Local Government should be "to fix the strength and pay of the services to which the High Court would recruit" and to lay down, if they so thought fit, any general requirements....." During the debates Marquis of Salisbury asked a question with regard to the general powers of the High Courts and the control over the subordinate Courts. It was :

"As I understood the Secretary of State in his statement, the control of the High Court over the Subordinate Judges in civil matters has to be as complete as possible and maintained. Is that so?" The answer was, "Yes". (No. 7937).

The recommendations of the Joint Committee also followed the same objective. In the report (paragraph 337, page 201) the following observations were made :

"337. *Necessity for securing independence of Subordinate Judiciary*.....The Federal and High Court Judges will be appointed by the Crown and their independence is secure ; but appointments to the Subordinate Judiciary must necessarily be made by authorities in India who will also exercise a certain measure of control over the Judges after appointment, especially in the matter of promotion and posting. We have been greatly impressed by the mischiefs which have resulted elsewhere from a system under which promotion from grade to grade in a judicial hierarchy is in the hands of a Minister exposed to pressure from members of a popularly elected Legislature. Nothing is more likely to sap the independence of a Magistrate than the knowledge that his career depends upon the favour of a Minister; and recent examples (not in India) have shown very clearly the pressure which may be exerted upon a Magistracy thus situated by men who are known, or believed, to have the means of bringing influence to bear upon a Minister. It is the Subordinate Judiciary in India who are brought most closely into contact with the people, and it is no less important, perhaps indeed even more important, that their independence should be placed beyond question than in the case of the superior Judges....."

As a result, when the Government of India Act, 1935, was passed it contained special provisions (sections 254—256 already quoted) with regard to District Judges and the Subordinate Judiciary. It will be noticed that there was no immediate attempt to put the Subordinate Criminal Magistracy under the High Courts but the posting and promotion and grant of leave of persons belonging to the Subordinate Judicial Service of a Province was put in the hands of High

Court though there was right of appeal to any authority named in the Rules and the High Courts were asked not to act except in accordance with the conditions of the service prescribed by the Rules. As regards the District Judges the posting and promotions of a District Judge was to be made by the Governor of the Province exercising his individual judgment and the High Court was to be consulted before a recommendation to the making of such an appointment was submitted to the Governor. Since section 240 of the Government of India Act, 1935 provided that a civil servant was not to be dismissed by an authority subordinate to that which appointed him, the Governor was also the dismissing authority. The Government of India Act, 1935 was silent about the control over the District Judge and the Subordinate Judicial Services. The administrative control of the High Court under section 224 over the Courts subordinate to it extended only to the enumerated topics and to superintendence over them. The independence of the subordinate judiciary and of the District Judges was thus assured to a certain extent, but not quite.

When the Constitution was being drafted the advance made by the 1935 Act was unfortunately lost sight of. The Draft Constitution made no mention of the special provisions not even similar to those made by the Government of India Act, 1935 in respect of the Subordinate Judiciary. If that had remained the Judicial Services would have come under Part XIV dealing with the services in India. An amendment, fortunately, was accepted and led to the inclusion of Articles 233 to 237. These articles were not placed in the Chapter on Services but immediately after the provisions in regard to the High Courts. The articles went a little further than the corresponding sections of the Government of India Act. They vested the control of the District Courts and the Courts subordinate thereto in the High Courts and the main question is what is meant by the word "control". The High Court has held that the word "Control" means not only a general superintendence of the working of the Courts but includes disciplinary control of the presiding judges that is to say, the District Judge and Judges subordinate to him. It is this conclusion which is challenged before us on various grounds.

Mr B Sen appearing for the West Bengal Government, contends that the word "control" must be given a restricted meaning. He deduces this (a) on a suggested reading of Article 235 itself and (b) on a comparison of the provisions of Chapter VI with those of Part XIV of the Constitution. We shall examine these two arguments separately as they admit of separate treatment. The first contention is that "control" means only control of the day-to-day working of the Courts and emphasis is laid on the words of Article 235 "District Courts" and "Courts subordinate thereto". It is pointed out that the expressions "District Judge" and "Judges subordinate to him" are not used. It is submitted that if the incumbents were mentioned control might have meant disciplinary control but not when the word "Court" is used. Lastly, it is contended that conditions of service are outside "control" envisaged by Article 235 because the conditions of service are to be determined by the Governor in the case of the District Judge and in the case of Judges subordinate to the District Judge by the Rules made by the Governor in that behalf after consultation with the State Public Service Commission and with the High Court.

We do not accept this construction. The word "control" is not defined in the Constitution at all. In Part XIV which deals with Services under the Union and the States the words "disciplinary control" or "disciplinary jurisdiction" have not at all been used. It is not to be thought that disciplinary jurisdiction of services is not contemplated. In the context the word "control" must, in our judgment include disciplinary jurisdiction. Indeed, the word may be said to be used as a term of art because the Civil Services (Classification Control and Appeal) Rules used the word "control" and the only rules which can legitimately come under the word "control" are the Disciplinary Rules. Further, as we have already shown, the history which lies behind the enactment of these articles indicates that "control" was vested in the High Court to effectuate a purpose,

namely, the securing of the independence of the Subordinate Judiciary and unless it included disciplinary control as well the very object would be frustrated. This aid to construction is admissible because to find out the meaning of a law, recourse may legitimately be had to the prior state of the law, the evil sought to be removed and the process by which the law was evolved. The word "control," as we have seen, was used for the first time in the Constitution and it is accompanied by the word "vest" which is a strong word. It shows that the High Court is made the sole custodian of the control over the judiciary. Control, therefore, is not merely the power to arrange the day-to-day working of the Court but contemplates disciplinary jurisdiction over the presiding Judge. Article 227 gives to the High Court superintendence over these Courts and enables the High Court to call for returns etc. The word "control" in Article 235 must have a different content. It includes something in addition to mere superintendence. It is control over the conduct and discipline of the Judges. This conclusion is further strengthened by two other indications pointing clearly in the same direction. The first is that the order of the High Court is made subject to an appeal if so provided in the law regulating the conditions of service and this necessarily indicates an order passed in disciplinary jurisdiction. Secondly, the words are that the High Court shall "deal" with the Judge in accordance with his rules of service and the word "deal" also points to disciplinary and not mere administrative jurisdiction.

Articles 233 and 235 make a mention of distinct powers. The first is power of appointments of persons, their postings and promotion and the other is power of control. In the case of the District Judges, appointments of persons to be and posting and promotion are to be made by the Governor but the control over the District Judge is of the High Court. We are not impressed by the argument that the word used is "District Court" because the rest of the article clearly indicates that the word "Court" is used compendiously to denote not only the Court proper but also the presiding Judge. The latter part of Article 235 talks of the man who holds the office. In the case of the Judicial Service Subordinate to the District Judge the appointment has to be made by the Governor in accordance with the Rules to be framed after consultation with the State Public Service Commission and the High Court but the power of posting, promotion and grant of leave and the Control of the Courts are vested in the High Court. What is vested includes disciplinary jurisdiction. Control is useless if it is not accompanied by disciplinary powers. It is not to be expected that the High Court would run to the Government or the Governor in every case of indiscipline however small and which may not even require the punishment of dismissal or removal. These articles go to show that by vesting "control" in the High Court the independence of the Subordinate Judiciary was in view. This was partly achieved in the Government of India Act, 1935 but it was given effect to fully by the drafters of the present Constitution. This construction is also in accord with the Directive Principles in Article 50 of the Constitution which reads :

"50. The State shall take steps to separate the Judiciary from the Executive in the Public Services of the State."

Mr. Sen next argues that Articles 309 to 311 (particularly Article 311) gave a clue to the meaning of the word "control". The argument is that the legislation regarding services of the State falls within the jurisdiction of the State Legislature and Article 309 gives the power to the State Legislature to regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the State. This is perhaps true. But Mr. Sen seems to make no distinction between legislative and executive powers. Under Article 162 the power of the Executive of the State is co-extensive with that of the Legislature of the State but all that is subject to the other provisions of the Constitution. That the Legislature has the power to make laws relating to the Services does not show that the Executive enjoys corresponding executive power if the Constitution indicates otherwise. Article 310 does no more than state the tenure of the office of the persons serving the Union or the State. That has no bearing upon the present dispute. Article 311 is, therefore, the only article which has relevance. That article reads as follows :—

<sup>1</sup> 311 *Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State*

(1) No person who is a member of a civil service of the Union or an all India service or a civil service of the State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him.

Provided that this clause shall not apply —

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge

(b) where an authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason to be recorded by that authority in writing it is not reasonably practicable to give to that person an opportunity of showing cause or

(c) where the President or Governor as the case may be is satisfied that in the interest of the security of the State it is not expedient to give to that person such an opportunity

(3) If any question arises whether it is reasonably practicable to give to any person an opportunity of showing cause under clause (2) the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank as the case may be, shall be final

Mr Sen argues somewhat syllogistically as follows. Under clause (1) of the Article no person in the service of the Union or the State can be dismissed or removed by an authority subordinate to that by which he is appointed. Under clause (2) no such person can be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause. Reading the above with Articles 233 and 234 he contends and rightly, that a District Judge or a Judge subordinate to the District Judge cannot be dismissed or removed by any authority other than the Governor. Mr Sen argues that this power of the Governor determines that the enquiry must be made by or under the directions of the Governor or the Government. To lend support to this contention Mr Sen draws pointed attention to provisos (b) and (c) to clause (2). He says that by reason of proviso (b), clause (2) does not apply if the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that it is not reasonably practicable to give to that person an opportunity of showing cause and under clause (3) the decision of that authority is made final. Again, by the proviso (c), says he, the Governor may dispense with the enquiry altogether if he is satisfied that in the interest of the security of the State it is not expedient to give to any person an opportunity of showing cause. Mr Sen contends that as the Governor alone can appoint or dismiss or remove District Judges and as he alone can decide whether, for any of the two reasons mentioned in provisos (b) and (c) an opportunity to a District Judge of showing cause against the charges levelled against him shall be denied the Governor alone can initiate enquiries and cause them to be held and the High Court cannot claim to hold them. In this way, he contends, the extent of control exercisable by the High Courts under Article 235 must be so cut down as to keep disciplinary jurisdiction out.

This argument was not presented in the High Court and does credit to the ingenuity of Mr Sen but it is fallacious. That the Governor appoints District Judges and the Governor alone can dismiss or remove them goes without saying. That does not impinge upon the control of the High Court. It only means that the High Court cannot appoint or dismiss or remove District Judges. In the same way the High Court cannot use the special jurisdiction conferred by the two provisos. The High Court cannot decide that it is not reasonably practicable to give a District Judge an opportunity of showing cause or that in the interest of the security of the State it is not expedient to give such an opportunity. Thus the Governor alone can decide. That certain powers are to be exercised by the Governor and not by the High Court does not necessarily take away other powers from the High Courts. The provisos can be given their full effect without giving rise to other implications. It is obvious that if a case arose for the exercise of the special powers under the two provisos, the High Court must leave the matter to the Governor. In this connection we may incidentally add that we have no doubt

that in exercising these special powers in relation to inquiries against District Judges, the Governor will always have regard to the opinion of the High Court in the matter. This will be so whoever be the inquiring authority in the State. But this does not lead to the further conclusion that the High Court must not hold the enquiry any more than that the Governor should personally hold the enquiry.

There is, therefore, nothing in Article 311 which compels the conclusion that the High Court is ousted of the jurisdiction to hold the enquiry if Article 235 vested such a power in it. In our judgment, the control which is vested in the High Court is a complete control subject only to the power of the Governor in the matter of appointment (including dismissal and removal) and posting and promotion of District Judges. Within the exercise of the control vested in the High Court, the High Court can hold enquiries, impose punishments other than dismissal or removal, subject however to the conditions of service, and a right of appeal if granted by the conditions of service, and to the giving of an opportunity of showing cause as required by clause (2) of Article 311 unless such opportunity is dispensed with by the Governor acting under the provisos (b) and (c) to that clause. The High Court alone could have held the enquiry in this case. To hold otherwise will be to reverse the policy which has moved determinedly in this direction.

The High Court was thus right in its conclusions. The appeal fails and is dismissed. It is clear that the conduct of Bagchi may not now be inquired into but that is a result which we can only regret. In the circumstances we make no order about costs.

K.S.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, *Acting Chief Justice*, RAGHUBAR DAYAL, R. S. BACHAWAT AND V. RAMASWAMI, JJ.

South Asia Industries (P.); Ltd.

.. *Appellant\**

v.

S.B. Sarup Singh and others

.. *Respondents.*

*Letters Patent (Lahore) (as amended in 1928), clauses 10 and 11—Delhi Rent Control Act (LIX of 1958), sections 39 and 43—Decision of single Judge of Punjab High Court in Second Appeal under section 39 of Delhi Rent Control Act—Appeal from to Division Bench of same High Court under clause 10 of Letters Patent—Competency—Section 43 of the Rent Control Act—Effect.*

Under the first part of clause 10 of the Letters Patent, Lahore, (as amended in 1928) an appeal lies from the judgment of a single Judge of the High Court of Punjab passed by him in exercise of his original jurisdiction or in exercise of first appellate jurisdiction, whether the appeal is against the order of Court or not; and in the case of second appellate jurisdiction, if the appeal is against the order of a Tribunal, which is not a Court. But in the case of a judgment of a single Judge of the High Court made in a Second Appeal against the decree or order of a Court subordinate to the High Court, no further appeal lies unless the said Judge declares that the case is a fit one for appeal.

Hence from the decision of a single Judge of the Punjab High Court passed in Second Appeal under section 39 of the Delhi Rent Control Act (LIX of 1958) from the order of the Rent Control Tribunal, an appeal would lie to the Division Bench of the High Court of Punjab under clause 10 of the Letters Patent, Lahore. But the right of appeal thus conferred under clause 10 of the Letters Patent has been taken away by section 43 of the Delhi Rent Control Act. (It was conceded that the appropriate Legislature can take away that right: See clause 37 of the Letters Patent, Lahore). The expression "final" in section 43 *prima facie* connotes that an order passed on appeal under the Delhi Rent Control Act is conclusive and no further appeal lies against it. The last sentence in section 43 imposes a further bar. Thus the expression "final" in the first part of section 43 puts an end to a further appeal.

and the words "shall not be called in question in any original suit, application or execution proceeding" bar collateral proceedings. The section imposes a total bar.

An appeal disposed of by a single Judge of the High Court and the appeal from the judgment of the single Judge to a Division Bench thereof are different appeals. There is no justification therefore to hold that an appeal under section 39 of the Delhi Rent Control Act and an appeal under clause 10 of the Letters Patent form part of a single appeal. They are in law and in fact different appeals—one given by the statute and the other by the Letters Patent. It cannot therefore be contended that the expression "appeal" in section 39 takes in also a Letters Patent Appeal under clause 10 of the Letters Patent, Lahore.

No appeal would therefore lie under clause 10 of the Letters Patent, Lahore, to a Division Bench of the Punjab High Court against a judgment passed by a single Judge of the said High Court in a Second Appeal under section 39 of the Delhi Rent Control Act, 1958.

Appeal from the Judgment and Order, dated the 11th December, 1963 of the Punjab High Court (Circuit Bench at Delhi) in L.P.A. No. 85-D of 1963.

*A. V. Viswanatha Sastri and Veda Vyasa*, Senior Advocates (*P. N. Chaddha, S. K. Mehta and A. L. Mehta*, Advocates, with them), for Appellant.

*Gopal Singh*, Advocate, for Respondents Nos. 1 and 2.

*Gurcharan Singh Bakshi and Gopal Singh*, Advocates, for Respondents Nos. 3 to 5.

The Judgment of the Court was delivered by

*Subba Rao, A. C. J.*—This appeal by certificate raises the question whether an appeal lies under clause 10 of the Letters Patent for the High Court of Lahore, to a Division Bench of the Punjab High Court against a judgment passed by a single Judge of the said High Court in a Second Appeal under section 39 of the Delhi Rent Control Act (LIX of 1958), hereinafter called the Act.

The facts relevant to the question raised may be briefly stated. The respondents are the owners of plot No. 5, Connaught Circus, New Delhi. Messrs Allen Berry & Co Private, Ltd. took a lease of the same under a lease deed dated 1st March, 1956. Messrs Allen Berry & Co. assigned their interest under the said lease deed to South Asia Industries (Private), Ltd., the appellant herein. Thereafter the respondents filed an application before the Controller, Delhi, under section 14 of the Act for the eviction of the appellant from the said premises on the ground that Messrs. Allen Berry & Co. unauthorizedly assigned the said premises in favour of the appellant. The Controller, by his order dated 10th October, 1962, allowed the petition. On 23rd January, 1963, the appeal filed by the appellant against the said order was dismissed by the Rent Control Tribunal, Delhi. Against the said order of the Tribunal the appellant filed an appeal in the High Court of Punjab under section 39 of the Act. The said Second Appeal was dismissed on 10th May, 1963, by Harbans Singh, J. The appellant filed an appeal against the judgment of the learned single Judge to Division Bench of the said High Court under clause 10 of the Letters Patent. That appeal came up for disposal before a Division Bench of the High Court, which dismissed the same on the ground that it was not maintainable. Hence the present appeal.

Mr. A. V. Viswanatha Sastri, learned Counsel for the appellant raised before us the following points: (1) section 39 of the Act confers a right of appeal from an order of the Rent Control Tribunal to the High Court and therefore, when once that appeal reaches the High Court, it has to exercise the jurisdiction in the same manner as it exercises other appellate jurisdiction, that is to say the judgment of a single judge in that appeal becomes subject to an appeal to the High Court under clause 10 of the Letters Patent; (2) section 43 of the Act is only a bar to initiate collateral proceedings for the purpose of questioning the order of the Tribunal and it does not make the judgment of a single Judge in an appeal under section 39 of the Act final; and that apart, a Letters Patent Appeal is not a separate appeal to the High Court but is only, in effect, the continuation of the same appeal in the High Court.

The arguments of Messers Gopal Singh and Gurcharan Singh Bakshi, learned Counsel for the respondents may be summarized thus : The Act confers a special jurisdiction on the High Court to entertain an appeal ; and the judgment in such an appeal does not attract clause 10 of the Letters Patent. That apart, the first part of clause 10 of the Letters Patent on which the appellant relies only provides for an appeal against the judgment of a single Judge made in the exercise of the High Court's Original Jurisdiction ; and even if it is wide enough to comprehend a judgment made in Appellate Jurisdiction, it should be an appeal against the order of a Court. In the instant case the Tribunal functioning under the Act is not a Court and, therefore, the judgment passed by a single Judge of the High Court against the judgment of such a Tribunal is not subject to Letters Patent appeal under the said clause. In any view, section 43 of the Act makes the judgment of a single Judge made in an appeal final and, therefore, to that extent, clause 10 of the Letters Patent has been modified by the appropriate Legislature.

Let us at the outset consider the relevant provisions uninfluenced by judicial decisions. As this stage it will be convenient to read the material provisions of the Letters Patent governing the Punjab High Court.

"Clause 11.—And we do further ordain that the High Court of Judicature at Lahore shall be a Court of Appeal from the Civil Courts of the Provinces of the Punjab and Delhi and from all other Courts subject to its superintendence and shall exercise appellate jurisdiction in such cases as were, immediately before the date of the publication of these presents subject to appeal to the Chief Court of the Punjab by virtue of any law then in force, or as may after that date be declared subject to appeal to the High Court of Judicature at Lahore by any law made by competent legislative authority for India."

Clause 10, before its amendment by Letters Patent of 1928, read as follows :

"And we do further ordain that an appeal shall lie to the said High Court of Judicature at Lahore, from the judgment (not being an order made in the exercise of revisional jurisdiction and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of section 107 of the Government of India Act, 1915, or in the exercise of Criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to section 13 of the said recited Act, and that an appeal shall also lie to the said High Court from the judgment (not being a sentence or order as aforesaid) of two or more Judges of the said High Court, or of such Division Court, whenever such Judges are equally divide in opinion, and do not amount in number to a majority of the whole of the Judges of the said High Court, at the time being, but that the right of appeal from other judgments of the Judges of the said High Court, or of such Division Court, shall be to Us, Our heirs or successors in Our or Their Privy Council, as hereinafter provided."

After the amendment in 1928, clause 10 reads :

"And we do further ordain that an appeal shall lie to the said High Court of Judicature at Lahore from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction and not being a sentence or order passed or made in the exercise of the power of superintendence, under the provisions of section 107 of the Government of India Act, or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to section 108 of the Government of India Act, and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant to section 108 of the Government of India Act, made on or after the first day of February, 1929, in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, where the Judge who passed the judgment declares that the case is a fit one for appeal ; but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to Us, Our heirs or successors in Our or Their Privy Council, as hereinafter provided."

The first part of clause 11 of the Letters Patent says that the High Court shall be a Court of Appeal from civil Courts of the Provinces of Punjab and Delhi and from all other Courts subject to the superintendence of the High Court, the second part thereof empowers the High Court to exercise appellate jurisdiction in such cases as were immediately before the date of the publication of the Letters Patent subject to appeal to the Chief Court of Punjab by virtue of any law then in force, or as may after that date be declared subject to appeal to the High Court of Judicature at Lahore by any law made by competent legislative authority for India. The second part does not make a distinction between appellate jurisdiction over Courts and that over Tribunals which are not Courts. If a law made by a competent legislative authority declares a case to be subject to appeal to the High Court



of Judicature, the said High Court acquires jurisdiction to entertain the same and dispose of it in accordance with law. If the High Court entertains an appeal in terms of clause 11 of the Letters Patent, clause 10 thereof is attracted to such an appeal. Under section 108 of the Government of India Act, 1915 the High Court may by its own Rules provide, as it thinks fit for the exercise by one or more Judges or by a Division Court constituted by two or more Judges of the High Court of original and appellate jurisdictions vested in the Court and under clause (2) thereof the Chief Justice of each High Court shall determine what Judge in each case is to sit alone and what Judges of the Court whether with or without the Chief Justice, are to constitute the several Division Courts. If in exercise of the jurisdiction under section 108 of the Government of India Act, 1915 an appeal filed in a High Court is posted before a single Judge of that Court and a judgment is delivered therein by that Judge one has to look to clause 10 of the Letters Patent to see whether a further appeal lies to the High Court against the said judgment. Before the amendment of clause 10 of the Letters Patent in 1928 from the judgment of a single Judge of the said High Court or one Judge of any Division Court an appeal lay to the said High Court, but there were certain exceptions to that rule. If the judgment was made by a single Judge in exercise of the powers of superintendence under section 107 of the Government of India Act, 1915, or in exercise of criminal jurisdiction, no further appeal lay from his judgment. There were no further exceptions such as that the said judgment should have been in an appeal against an order of a Court. A plain reading of the said clause indicates that except in the 3 cases excluded an appeal lay against the judgment of a single Judge of the High Court to the High Court in exercise of any other jurisdiction. As the clause then stood it would appear that an appeal lay against the judgment of a single Judge of the High Court made in exercise of second appellate jurisdiction without any limitation thereon. The effect of the amendment made in 1928, so far as is relevant to the present enquiry is the exclusion of the right of appeal from a judgment passed by a single Judge sitting in Second Appeal unless the Judge who passed the judgment grants a certificate that the case is a fit one for appeal. The amended clause, presumably for the purpose of artistic drafting, practically leaves the first part as it was and in the second part introduces a limit in the matter of a further appeal against the judgment of such a single Judge. Looking at the first part of the amended clause excluding the exceptions, it is obvious that its wording is general. Therefore the said judgment is made in exercise of appellate revisional or criminal jurisdiction or where the judgment is made in a first appeal or second appeal against the order of a Court or a Tribunal. Four exceptions are carved out from the general rule. Apart from the three exceptions to the general rule already noticed in the context of the unamended clause the amended clause introduces another exception noticed supra. The result is that under the first part of clause 10 of the Letters Patent an appeal lies from the judgment of a single Judge of the High Court passed by him in exercise of his original jurisdiction or in exercise of first appellate jurisdiction, whether the appeal is against the order of a Court or not, and in the case of second appellate jurisdiction, if the appeal is against the order of a Tribunal which is not a Court. But in the case of a judgment made in a Second Appeal against the decree or order of a Court subordinate to the High Court no further appeal lies unless the said Judge declares that the case is a fit one for appeal. It is not permissible, by construction to restrict the scope of the generality of the provisions of clause 10 of the Letters Patent. The argument that a combined reading of clauses 10 and 11 of the Letters Patent leads to the conclusion that even the first part of clause 10 deals only with appeals from Courts subordinate to the High Court has no force. As we have pointed out earlier clause 11 contemplates conferment of appellate jurisdiction on the High Court by an appropriate Legislature against orders of a Tribunal. Far from detracting from the generality of the words 'judgment' by one Judge of the said High Court, clause 11 indicates that the said judgment takes in one passed by a single Judge in an appeal against the order of a Tribunal. It is said, with some force, that if this construction be accepted, there

will be an anomaly, namely, that in a case where a single Judge of the High Court passed a judgment in exercise of his appellate jurisdiction in respect of a decree made by a Court subordinate to the High Court, a further appeal to that Court will not lie unless the said Judge declares that the case is a fit one for appeal, whereas, if in exercise of his second appellate jurisdiction, he passed a judgment in an appeal against the order of a Tribunal, no such declaration is necessary for taking the matter on further appeal to the said High Court. If the express intention of the Legislature is clear, it is not permissible to speculate on the possible reasons that actuated the Legislature to make a distinction between the two classes of cases. It may be, for ought we know, the Legislature thought fit to impose a limitation in a case where 3 Courts gave a decision, whereas it did not think fit to impose a limitation in a case where only one Court gave a decision.

This Court in *National Sewing Thread Co., Ltd v. James Chadwick & Bros. Ltd.*, construed clause 15 of the Letters Patent for the Bombay High Court, corresponding to clause 10 of the Letters Patent for the Lahore High Court. There the question was whether a Letters Patent Appeal lay from a judgment of a single Judge of the Bombay High Court to a Division Bench of that High Court against the decision of the Registrar of Trade Marks under the Trade Marks Act, 1940. Section 76 (1) of the said Act provided that "an appeal shall lie from any decision of the Registrar under this Act or the Rules made thereunder to the High Court having jurisdiction"; and the Act did not make any provision in regard to the procedure to be followed by the High Court in the appeal, or as to whether the order passed in the appeal was appealable. Two points were raised before this Court, namely, (1) the provisions of the first part of clause 15 of the Letters Patent for the Bombay High Court could not be attracted to an appeal preferred to the High Court under section 76 of the Trade Marks Act, 1940; and (2) the said clause would have no application in a case where the judgment could not be said to have been delivered pursuant to section 108 of the Government of India Act, 1915. On the first question, this Court held that the High Court being seized as such of the appellate jurisdiction conferred by section 76 of the Trade Marks Act, 1940, it had to exercise that jurisdiction in the same manner as it exercised its other appellate jurisdiction and when such jurisdiction was exercised by a single Judge, his judgment became subject to appeal under clause 15 of the Letters Patent of the Bombay High Court there being nothing to the contrary in the Trade Marks Act. On the second question, this Court held thus:

"We are therefore of the opinion that section 108 of the Government of India Act, 1915, conferred power on the High Court which the Court could exercise from time to time with reference to its jurisdiction whether existing at the coming into force of the Government of India Act, 1915, or whether conferred on it by any subsequent legislation."

The difference between that case and the present one is that the single Judge in that case passed a judgment in a first appeal against the order of the Registrar, while in the present case the single Judge passed an order in a Second Appeal. But that will not make any difference in the construction of the first part of clause 10 of the Letters Patent for the High Court of Lahore, corresponding to clause 15 of the Letters Patent for the High Court of Bombay. Another difference is that while under the last part of clause 11 of the Letters Patent for the Lahore High Court there are the words "or as may after that date be declared subject to appeal to the High Court of Judicature at Lahore by any law made by competent legislative authority for India", the said words are absent in the corresponding clause 16 of the Letters Patent for the Bombay High Court. Notwithstanding the said omission this Court in the said case held that the appeal under the Trade Marks Act was an addition of a new subject-matter of appeal to the appellate jurisdiction already exercised by the High Court and that the Rules made under section 108 of the Government of India Act, 1915, applied to the same. It is contended that in that case it was not argued that the Registrar was not a Court, and therefore the Supreme Court assumed that the Registrar was a Court and on that assumption held that the first part of clause 15 of the Letters Patent of the Bombay High Court was attracted.

We do not see any justification for this argument. One of the contentions raised before the Court was that the Trade Marks Act created a new Tribunal and conferred a new appellate jurisdiction on the High Court. This Court rejected that contention with the following words:

'The statute creates the Registrar a tribunal for safeguarding its jurisdiction and for giving effect to the rights created by the Act, and the High Court as such without more has been given appellate jurisdiction over the decisions of this tribunal.

The entire judgment proceeded on the basis that the Registrar was only a tribunal. It is not possible to visualize that both the Advocates as well as the Judges of this Court missed the point that the Tribunal was not a Court and therefore applied the first part of clause 15 of the Letters Patent of the Bombay High Court. Indeed, the question of applicability of section 108 of the Government of India Act, 1915, to the appeal in that case would not have arisen if it was an appeal against the order of a civil Court. We, therefore, cannot countenance the argument that the Court assumed that the Registrar was a Court in applying clause 15 of the Letters Patent of the Bombay High Court in the appeal in question in that clause. This decision therefore covers the question now raised before us.

The relevant rule applicable to the present case has been stated by this Court in the aforesaid decision thus:

Obviously after the appeal had reached the High Court it has to be determined according to the rules of practice and procedure of that Court and in accordance with the provisions of the charter under which that Court is constituted and which confers on it power in respect to the method and manner of exercising that jurisdiction. The rule is well settled that when a statute directs that an appeal shall lie to a Court already established then the appeal must be regulated by the practice and procedure of that Court.

This principle was laid down by the Judicial Committee in a number of decisions: see *National Telephone Co., Ltd. v. Postmaster General*<sup>1</sup>, *R. M. A. R. Adzokappa Chethar v. Ra Chandrasekhara Thevar*<sup>2</sup>, *Secretary of State for India v. Chellikani Rama Rao*<sup>3</sup>, *Maung Ba Thaw v. Ma Pin*<sup>4</sup>, and *Hem Singh v. Basant Das*<sup>5</sup>.

The following legal position emerges from the said discussion. A statute may give a right of appeal from an order of a tribunal or a Court to the High Court without any limitation thereon. The appeal to the High Court will be regulated by the practice and procedure obtaining in the High Court. Under the rules made by the High Court in exercise of the powers conferred on it under section 108 of the Government of India Act, 1915, an appeal under section 39 of the Act will be heard by a single Judge. Any judgment made by the single Judge in the said appeal will, under clause 10 of the Letters Patent, be subject to an appeal to that Court. If the order made by a single Judge is a judgment and if the appropriate Legislature has, expressly or by necessary implication, not taken away the right of appeal, the conclusion is inevitable that an appeal shall lie from the judgment of a single Judge under clause 10 of the Letters Patent to the High Court. It follows that if the Act had not taken away the Letters Patent Appeal, an Appeal shall certainly lie from the judgment of the single Judge to the High Court.

In the view we have expressed it is not necessary to consider the question whether the tribunal is a Court or not, for as we have pointed out earlier, it is not germane to the question of maintainability of the Letters Patent Appeal.

The next question is whether the right of appeal conferred by clause 10 of the Letters Patent, Lahore, has been taken away by a law made by the appropriate Legislature. It is conceded that the appropriate Legislature can take away that right: see clause 37 of the Letters Patent, Lahore. It is argued by the learned Counsel for the respondents that section 43 of the Act has that effect. The relevant provisions of the Act may now be noticed:

Section 39—(1) Subject to the provisions of sub-section (2), an appeal shall lie to the High Court from an order made by the Tribunal within sixty days from the date of such order.

1. L.R. (1913) A.C. 546.

2. (1917) L.R. 74 I.A. 264. (1918) 1 M.L.J. 41.

3. (1916) 31 M.L.J. 324. 1 L.R. 39 Mad. 617.

A.I.R. 1916 P.C. 21.

4. (1931) L.R. 61 I.A. 158. 66 M.L.J. 404.

5. L.R. 63 I.A. 180. A.I.R. 1936 P.C. 93.

\* \* \* \* \*

(2) No appeal shall lie under sub-section (1), unless the appeal involves some substantial question of law.

Section 43.—Save as otherwise expressly provided in this Act, every order made by the Controller or an order passed on appeal under this Act shall be final and shall not be called in question in any original suit, application or execution proceeding.<sup>1</sup>

A combined reading of the said two sections may be stated thus : Subject to the right of appeal to the High Court on a substantial question of law, the order passed by the High Court on appeal is final and it shall not be called in question in any original suit, application or execution proceeding. Mr. Viswanatha Sastri contends that the last sentence in section 43 of the Act gives colour to the expression "final". According to him, finality is only with reference to collateral proceedings such as, suits, applications and execution proceedings.

The expression "final" *prima facie* connotes that an order passed on appeal under the Act is conclusive and no further appeal lies against it. The last sentence in section 43 of the Act, in our view, does not restrict the scope of the said expression; indeed, the said sentence imposes a further bar. The expression "final" in the first part of section 43 of the Act puts an end to a further appeal and the words "shall not be called in question in any original suit, application or execution proceeding" bar collateral proceedings. The section imposes a total bar. The correctness of the judgment in appeal cannot be questioned by way of appeal or by way of collateral proceedings. It is true that the expression "final" may have a restrictive meaning in other contexts, but in section 43 of the Act such a restrictive meaning cannot be given, for Chapter VI of the Act provides for a hierarchy of tribunals for deciding disputes arising thereunder. The Act is a self-contained one and the intention of the Legislature was to provide an exhaustive code for disposing of the appeals arising under the Act. The opening words of section 43 of the Act "save as otherwise expressly provided in this Act" emphasize the fact that the finality of the order cannot be questioned by resorting to something outside the Act. Some of the decisions cited at the Bar defining the expression "final" may usefully be referred to. In *Maung Ba Thaw v. Ma Pin*<sup>1</sup>, the Judicial Committee had to consider whether an appeal lay to the Privy Council against the order of the High Court under section 75 (2) of the Provincial Insolvency Act, 1920. The said Act provided by section 4 (2) that subject to the provisions of the Act and notwithstanding anything contained in any other law for the time being in force, the decision of the District Court under the Act was final; but under section 75 (2), however there was a right of appeal to the High Court from the decision of the District Court. The Judicial Committee held that in a case where the Act gave a right to appeal to the High Court, an appeal from the decision of the High Court lay to the Privy Council under, and subject to, the Code of Civil Procedure. It reiterated the principle that where a Court is appealed to as one of the ordinary Courts of the country, the ordinary rules of the Code of Civil Procedure applied. It will be noticed at once that the order of the District Court was final subject to the provisions of the said Act and under the said Act a right of appeal was given to the High Court. The order of the High Court in the appeal was not made final. Therefore, the Judicial Committee held that an appeal lay to the Privy Council against the order of the High Court. The decision, therefore, does not really help the appellant. In *Kydd v. Liverpool Watch Committee*<sup>2</sup>, the facts were as follows : Under section 11 of the Police Act, 1890, (53 & 54 Vict. c. 45), there was an appeal to Quarter Sessions as to the amount of a Constable's pension. The duty of the Quarter Session was stated thus :

"that Court, after inquiry into the case, may make such order in the matter as appears to the Court just, which order shall be final."

Lord Loreburn, L.C., construed the said section thus :

"Where it says, speaking of such an order, that it is to be final, I think it means there is to be an end of the business at Quarter Sessions....."

1. (1934) L.R. 61 I.A. 158; 66 M.L.J. 404.      2. L.R. (1908) A.C. 327, 331-332.

The Judicial Committee again in *Secretary of State v Hindustan Co operative Insurance Society Ltd*<sup>1</sup>, construed the expression "final" and held that the expression was intended to exclude any further appeal. There, under section 71 of the Calcutta Improvement Act, 1911, a limited right of appeal to the High Court was given from an award of the Tribunal and it provided that subject to that right only, the award should be final. Their Lordships held that the provision for finality was intended to exclude any further appeal. No further citation is called for. As we have stated the expression 'final' in section 43 of the Act indicates that no further appeal is contemplated against the order passed on appeal against the order of the Tribunal.

To escape from this construction a larger scope is sought to be given to the expression "appeal to the High Court". It is said that the expression "appeal" in sections 43 and 39 of the Act means an appeal to the High Court and not to a single Judge and that the said appeal is finally disposed of only by the final judgment of the High Court. It is said that whatever may be the internal arrangement in disposing of that appeal there is only one appeal till it is finally disposed of. This argument is plausible, but it has not found favour with this Court. This Court in *Union of Ind a v Mohindra Supply Company*<sup>2</sup>, considered the question whether section 39 (2) of the Indian Arbitration Act, 1940 has taken away the right of appeal under the Letters Patent. Section 39 (2) of the said Act reads as follows:

No Second Appeal shall lie from an order passed in appeal under this section but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

It was argued as it is argued before us, that the Second Appeal under the section referred to an appeal to a superior Court and not to appeals "Intra Court" and therefore section 39 (2) of the Arbitration Act did not operate to prohibit an appeal under the Letters Patent against the order of a single Judge. This Court held that the expression 'Second Appeal' included an appeal under the Letters Patent. This decision ruled that a Letters Patent Appeal is not a part of the appeal filed in High Court against the award of the Arbitrator, but is a fresh appeal against the order of the single Judge. This Court in *Ladli Prasad Jaswal v Karnal Distillery Co., Ltd*<sup>3</sup> held that the expression "Court immediately below" in Article 133 (1) (a) of the Constitution took in a single Judge of the High Court. There the judgment of the District Judge was reversed by the single Judge of the High Court. Against the order of the single Judge of the High Court in appeal from that of the Subordinate Judge a Letters Patent Appeal was preferred to a Division Bench of the High Court and the said Division Bench affirmed the judgment of the single Judge. The question arose whether the single Judge was a Court immediately below the Division Bench. For the respondent it was contended that the judgment of the High Court against which the appeal was preferred affirmed the decision of the Court immediately below and that the appeal did not involve any substantial question of law and therefore, the High Court was not competent to grant a certificate under Article 133 (1) (a) of the Constitution. For the appellant it was urged that the appeal against the judgment of the single Judge to a Division Bench under clause 10 of the Letters Patent was a "domestic appeal" within the High Court and in deciding whether the decree of a Division Bench in appeal under the Letters Patent from a decision of a single Judge exercising appellate jurisdiction affirmed the decision of the Court immediately below regard must be had to the decree of the Court subordinate to the High Court against the decision of which the appeal was preferred to the High Court. This Court came to the conclusion that the expression 'Court immediately below' in Article 133 (1) (a) must mean a Court from the decision of which the appeal has been filed in the High Court whether such a Judge was a single Judge of the High Court or a Court subject to the superintendence of the High Court. It will be seen that if a Letters Patent Appeal was only a continuation of the appeal filed from the decree of the District Judge by a domestic arrangement, it is Court would have held that the judgment in the Letters Patent Appeal was not a judgment of affirmation but one of reversal of the judgment

<sup>1</sup> 61 V.L.J. 664 L.R. 58 I.A. 259 A.I.R. 1931 P.C. 149

<sup>2</sup> (1962) 2 S.C.J. 179 (1962) 2 V.L.J. (S.C.)

63 (1967) 2 A.W.J.R. (S.C.) 63 (1962) 3 S.C.R.

497

3 (1964) 2 S.C.J. 12 (1964) 1 S.C.R. 270.

of the District Court. This decision, therefore, recognizes that an appeal disposed of by a single Judge of the High Court and the appeal from the judgment of the single Judge to a Division Bench thereof are different appeals. Apart from these decisions on principle we do not see any justification to hold that an appeal under section 39 (1) of the Act and an appeal under clause 10 of the Letters Patent form part of a single appeal. They are in law and in fact different appeals—one given by the Statute and the other by the Letters Patent. We cannot, therefore, accede to the argument advanced by the learned Counsel for the appellant that the expression “appeal” in section 39 of the Act takes in a Letters Patent Appeal under clause 10 of the Letters Patent.

Learned Counsel for the respondents further contended that section 39 of the Act conferred a special jurisdiction on the High Court as *persona designata* and, therefore, the decision of the single Judge in appeal is not a “judgment” within the meaning of clause 10 of the Letters Patent. In support of this view reliance was placed, *inter alia* on *Radha Mohan Pathak v. Upendra Patowary*<sup>1</sup>, and *Haush Kumar Kishanchand v. The Union of India*<sup>2</sup>. But in the view we have expressed on the construction of section 39, read with section 43 of the Act it is not necessary to deal with that question in this appeal. We shall not be understood to have expressed our opinion on this question one way or other.

In the result, the appeal fails and is dismissed with costs.

V.K.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :— P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, M. HIDAYATULLAH, J. C. SHAH AND S. M. SIKRI, JJ.

Bhaiya Lal

.. *Appellant\**

v.

Harikishan Singh and others

.. *Respondents.*

*Constitution of India (1950), Article 341 (1)—Constitution (Scheduled Castes) Order, 1950, issued by President under Article 341 (1)—Public notification regarding scheduled castes—Plea that Dohar caste is a sub-caste of Chamar caste—If can be entertained.*

The notification under Constitution (Scheduled Castes) Order, 1950 refers to Chamar Jatav or Mochi, and so, in dealing with the question whether a candidate is a Chamar shown in the Order as a Scheduled caste, the plea that though he is not a Chamar as such, he can claim the same status by reason of the fact that he belongs to the Dohar caste which is a sub-caste of the Chamar caste, cannot be accepted.

It cannot be said that it was not competent to the President to specify the lists of Scheduled Castes by reference to different districts or sub-areas of States. Educational and social backwardness in regard to castes races or tribes may not be uniform or of the same intensity in the whole of the State; it may vary in degree or in kind in different areas and that may justify the division of the State into convenient and suitable areas for the purpose of issuing the public notification in question.

Appeal by Special Leave from the Judgment and Order dated 23rd April, 1963 of the Madhya Pradesh High Court in First Appeal No. 24 of 1963.

N. C. Chatterjee, Senior Advocate, (V. S. Sawhney, S. S. Khanduja and Ganpat Rai, Advocates, with him) for Appellant.

G. S. Pathak, Senior Advocate, (Dipak Datta Choudhri, Advocate, with him), for Respondent No. 1.

The Judgment of the Court was delivered by

Gajendragadkar, C.J.—This appeal by Special Leave arises out of an Election petition filed by respondent No. 1, Harikishan Singh, challenging the validity of the

1. A.I.R. (1962) Assam 71.

\*G.A. No. 765 of 1964.

2. (1959) S.C.J. 603 : (1959) S.C.R. 117.  
5th February, 1965.

election of the appellant, Bhasyala in a reserved seat in the Berasia Constituency in the district of Sehore in Madhya Pradesh. The election in question was held in February, 1962 at this election the appellant, respondent No 1, and three others offered themselves as candidates. The appellant was declared duly elected on the 26th February, 1962, since he had polled the highest number of votes. His next rival was respondent No 1. By his petition respondent No 1 challenged the validity of the appellant's election on the ground that the appellant belonged to the Dohar caste and was not a Chamar. The appellant had filed his nomination paper on the 19th January, 1962 before the Returning Officer at Sehore and had declared that he was a member of the Chamars scheduled caste of the State of Madhya Pradesh in relation to Sehore district. This declaration was accepted by the Returning Officer. Respondent No 1 contended that Dohar caste was not recognised as the scheduled caste for the district of Sehore and Raisen and so the Returning Officer had improperly and illegally accepted the declaration of the appellant as one belonging to the Chamar scheduled caste. Since the appellant did not belong to the scheduled caste in question he was not entitled to stand for election for the reserved seat in respect of the said constituency. This is the basis on which the validity of the appellant's election was challenged by respondent No 1. On the other hand the appellant urged that the election petition filed by respondent No 1 was not maintainable inasmuch as he had not deposited the security of Rs 2000 in the manner prescribed by the statutory rules.

On these pleadings the Election Tribunal framed appropriate issues. The first four issues covered the principal contention raised by respondent No 1 against the validity of the Appellant's nomination as a member belonging to the Chamar scheduled caste whereas the fifth issue related to the appellant's contention about the incompetence of the election petition filed by respondent No 1. Both parties led evidence in support of their pleas on the principal point of dispute between them. The Election Tribunal considered the oral evidence adduced by the parties, examined the documents on which they respectively relied and found in favour of respondent No 1. In regard to the plea raised by the appellant against the competence of the election petition the Tribunal found against him. In the result the election petition was allowed and the appellant's election declared invalid.

Against this decision of the Election Tribunal the appellant preferred an appeal to the Madhya Pradesh High Court. Before the High Court the same two points were urged. The High Court has confirmed the finding of the Election Tribunal on both the points. It has held that the election petition filed by respondent No 1 was valid and the security deposit was made by him in accordance with the statutory requirements. On the merits of the controversy as to whether the appellant was a Chamar by caste and as such was entitled to be elected for the reserved seat in the constituency in question the High Court in substance, has agreed with the conclusion of the Election Tribunal. In consequence, the appeal preferred by the appellant was dismissed on the 23rd April, 1963. It is against this decision that the appellant has come to this Court by Special Leave.

On behalf of the appellant Mr Chatterjee has contended that the High Court was in error in confirming the finding of the Election Tribunal in regard to the caste to which the appellant belonged. It appears that the appellant's case was that he was a Dohar Chamar which according to him is a sub-caste of the Chamar scheduled caste. He urged that the said sub-caste was also called 'Môchi'. In support of this plea the appellant examined witnesses and produced documents and as we have just indicated, respondent No 1 also produced documents and examined witnesses to show that the Dohar caste was distinct from and independent of the Chamar caste and Dohars could not therefore, claim to be Chamars within the meaning of the Presidential Order. Thus the question which arose between the parties for decision in the present proceedings is a question of fact and on this question both the Tribunal and the High Court have made concurrent findings against the appellant. It is true that in reaching their conclusion on this point, the Tribunals as well as the High Court had to consider oral as well as documentary

evidence ; but in cases of this kind where the Tribunal and the High Court make concurrent findings on questions of fact, this Court does not usually interfere ; and after hearing Mr. Chatterjee we see no reason to depart from our usual practice in this matter.

Respondent No. 1 examined 13 witnesses belonging to the caste of the appellant. All of them asserted that they did not belong to the Chamar caste. According to their evidence, the Dohar caste was different from the Chamar caste. There was no inter-caste marriage nor even inter-caste dinners between the members of the said two castes. The evidence shows that Chamars and Mochis of Sehore district lived in mohallas different from the mohallas in which the Dohars lived. Amongst the witnesses examined by respondent No. 1, the High Court has attached considerable significance to the evidence of Kishanlal, P.W. 4. He was the Secretary of the Dohar Samaj started by the appellant himself. The appellant was then the Sirpanch of that Samaj. It is true that the Samaj did not function for long ; but the documents produced by respondent No. 1 to show the constitution of the Samaj clearly indicate that the appellant had taken a prominent part in that matter. Kishanlal's evidence is absolutely clear and unambiguous. He has stated on oath that the Dohar and the Chamar castes are entirely different. The Chamars, according to him, take off skins from dead animals, prepare shoes and do leather work ; the Dohar, said the witness, is not the sub-caste of Chamar caste ; there is no relationship of inter-dining and inter-marriage between the two. He denied that the Dohars are called Mochis. Mr. Chatterjee has not been able to show any reason why the evidence of this witness should not have been believed by the High Court. The witness belongs to the same caste as the appellant and there is no motive shown why he should take a false oath in respect of a matter which to persons of his status has great significance. It is not likely that a person like Kishanlal would make false statement about his own caste.

In support of his oral evidence, respondent No. 1 produced certain documents, Exhibits P-2, P-3, P-4 and P-5. These are all signed by the appellant and they relate to the year 1956. In these documents, the appellant has described himself as Dohar ; in none of them has he mentioned his caste as Chamar. Similar is the effect of other documents on which respondent No. 1 relied ; they are P-8, P-10, P-11, P-6, P-7, P-9, P-14, P-15, P-17, P-19 to P-27.

In rebuttal the appellant examined himself and his witnesses. This oral evidence was intended to show that the Dohar caste is the same as Mochi caste and it is a sub-caste of the Chamar caste. In addition to the oral evidence, the appellant produced 22 documents. It is true that some of these documents which had been discarded by the Election Tribunal as unworthy of credence or as irrelevant, have been accepted by the High Court as relevant and genuine. Even so, the High Court has come to the conclusion that these documents do not show satisfactorily that the Dohar caste is a sub-caste of the Chamar caste. In that connection, the High Court has pointed out that the documents relied upon by the appellant do not support his case that the Dohar caste is a sub-caste of the Chamar caste, and in that sense, they are not consistent with the plea made by the appellant in the present proceedings. We allowed Mr. Chatterjee to take us through the material evidence ; and on considering the said evidence in the light of the criticism made by Mr. Chatterjee, we are satisfied that there is no reason to interfere with the concurrent finding recorded by the Tribunal and the High Court on the main question of fact. We must, accordingly, hold that the appellant does not belong to the Chamar caste and as such was not qualified to contest the reserved seat for the scheduled caste of Chamars in the constituency in question.

Incidentally, we may point out that the plea that the Dohar caste is a sub-caste of the Chamar caste cannot be entertained, in the present proceedings in view of the Constitution (Scheduled Castes) Order, 1950. This Order has been issued by the President under Article 341 of the Constitution. Article 341 (1) provides that the President may with respect to any State or Union-Territory, and where it is a State after consultation with the Governor thereof, by public notification, specify the castes, races or tribes or parts of or groups within castes, races, or tribes which shall for the



purposes of this Constitution be deemed to be Scheduled Castes in relation to that State or Union Territory, as the case may be. Sub Article (2) lays down that Parliament may by law include in or exclude from the list of scheduled castes specified in a notification issued under clause (1) any caste, race or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification. It is thus clear that in order to determine whether or not a particular caste is a scheduled caste within the meaning of Article 341, one has to look at the public notification issued by the President in that behalf. In the present case, the notification refers to Chamar, Jatav or Mochi, and so, in dealing with the question in dispute between the parties, the enquiry which the Election Tribunal can hold is whether or not the appellant is a Chamar, Jatav or Mochi. The plea that though the appellant is not a Chamar as such, he can claim the same status by reason of the fact that he belongs to the Dohar caste which is a sub-caste of the Chamar caste, cannot be accepted. It appears to us that an enquiry of this kind would not be permissible having regard to the provisions contained in Article 341. In the case of *B. Basalingappa v. D. Mami hinnappa and others*<sup>1</sup>, this Court had occasion to consider a similar question. The question which arose for decision in that case was whether respondent No. 1, though Voddar by caste, belonged to the scheduled caste of Bhovi mentioned in the Order and while holding that an enquiry into the said question was permissible, the Court has elaborately referred to the special and unusual circumstances which justified the High Court in holding that Voddar caste was the same as the Bhovi caste within the meaning of the Order, otherwise the normal rule would be

it may be accepted that it is not open to make any modification in the Order by producing evidence to show for example, that though caste A alone is mentioned in the Order, caste B is also a part of caste A and therefore must be deemed to be included in caste A.

That is another reason why the plea made by the appellant that the Dohar caste is a sub-caste of the Chamar caste and as such must be deemed to be included in the Order, cannot be accepted.

Whilst we are referring to this aspect of the matter, we may point out that the Order has taken good care to specify different castes under the same heading where enquiry showed that the same caste bore different names, or it had sub-castes which were entitled to be treated as scheduled castes for the purposes of the Order. In the district of Datia, for instance, entry 3 refers to Chamar, Ahirwar, Chamar Mangar, Mochi or Raidas. Similarly, in respect of Mahārashtra, item 1, entries 3 and 4 refer to the same castes by different names which shows either that the said castes are known differently or consist of different sub-castes. Likewise, item 2, entry 4 in the said list refers to Chamar, Chamari, Mochi, Nona, Rohidas, Ramnam, Satnam, Surjyabanshi or Sarjyarnnam. It is also remarkable that in Maharashtra in certain districts Chambhar and Dhor are included in the list separately. Therefore, we do not think that Mr Chatterjee can seriously quarrel with the conclusion of the High Court that the appellant has not shown that he belongs to the Chamar caste which has been shown in the Order as a scheduled caste in respect of the Constituency in question.

Mr Chatterjee attempted to argue that it was not competent to the President to specify the lists of Scheduled Castes by reference to different districts or sub areas of the States. His argument was that what the President can do under Article 341 (1) is to specify the castes, races or tribes or parts thereof, but that must be done in relation to the entire State or the Union territory, as the case may be. In other words, says Mr Chatterjee, the President cannot divide the State into different districts or sub areas and specify the castes, races or tribes for the purpose of Article 341 (1). In our opinion, there is no substance in this argument. The object of Article 341 (1) plainly is to provide additional protection to the members of the Scheduled Castes having regard to the economic and educational backwardness from which they suffer. It is obvious that in specifying castes, races or tribes, the President has been expressly authorised to limit the notification to parts of or groups with-

in the castes, races or tribes, and that must mean that after examining the educational and social backwardness of a caste, race or tribe, the President may well come to the conclusion that not the whole caste, race or tribe but parts of or groups within them should be specified. Similarly, the President can specify castes, races or tribes or parts thereof in relation not only to the entire State, but in relation to parts of the State where he is satisfied that the examination of the social and educational backwardness of the race, caste or tribe justifies such specification. In fact, it is well-known that before a notification is issued under Article 341 (1), an elaborate enquiry is made and it is as a result of this enquiry that social justice is sought to be done to the castes, races, or tribes as may appear to be necessary, and in doing justice, it would obviously be expedient not only to specify parts or groups of castes, races or tribes, but to make the said specification by reference to different areas in the State. Educational and social backwardness in regard to these castes, races or tribes may not be uniform or of the same intensity in the whole of the State; it may vary in degree or in kind in different areas and that may justify the division of the State into convenient and suitable areas for the purpose of issuing the public notification in question. Therefore, Mr. Chatterjee is in error when he contends that the notification issued by the President by reference to the different areas is outside his authority under Article 341 (1).

The result is, the appeal fails and is dismissed with costs.

K.S.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, RAGHUBAR DAYAL, J. R. MUDHOLKAR, R. S. BACHAWAT AND V. RAMASWAMI, JJ.

Sri La Sri Subramanya Desiga Gnanasambanda Pandarasannadhi

*v.*

The State of Madras

*Respondent.*

*Madras Hindu Religious and Charitable Endowments Act (XIX of 1951), section 62 (3-a)—Application by Commissioners for modifying Scheme under which the Trustee was administering the Temple—No proof of any of the charges levelled against trustee—Appointment of an Executive Officer to be in charge of administration—Not warranted—Madras Act XXII of 1959 enacted after the suit—Plenary powers of Commissioner.*

The provisions of the scheme framed by the High Court in respect of the temple, introduced an Executive Officer to be appointed by the Commissioner and removable by him, in substance under his control, to be in charge of the entire administration of the temple. Such a drastic provision may be necessary in a case where the temple is mismanaged or if there are other circumstances which compel such an appointment. But in the face of the concurrent finding of fact that the Commissioner has failed to establish any of the charges levelled by him against the Trustee functioning under the original scheme, no case has been made out for the appointment of an Executive Officer who practically displaces the Trustee.

The power to appoint additional trustees in present or in future can be affirmed.

This judgment will not preclude the Commissioner to take any action under the new Act of 1959 as the circumstances demand.

Appeal from the Judgment and Decree, dated 7th February, 1958, of the Madras High Court in Appeal Suit No. 318 of 1954.

A. V. Viswanatha Sastri, Senior Advocate, (*Naunit Lal*, Advocate, with him), for Appellant.

A. Ranganadham Chetty, Senior Advocate, (*Miss A. Vedavalli and A. V. Rangam*, Advocates with him), for Respondent.

The Judgment of the Court was delivered by

*Subba Rao, J.*:—Sri Vaidyanathaswami Temple at Vaitheeswarankoil, Sirkali Taluk, Thanjavur District, Madras State, is an ancient and famous Siva temple. It owns a large extent of immovable property and it is said that its annual income

is more than Rs 2 lakhs. In 1842 the British Government, which was then administering the temple, handed over its management to the Pandarasannadhi of Dharma puram Adhinam. Since then the said Pandarasannadhi has been managing the same through one of his selected disciples, a Kattalai Thambiran. In the year 1919 the High Court of Madras framed a scheme for the administration of the said temple in A S No 181 of 1917. The said scheme provided, among others, that the administration of the temple should be in the hands of the Kattalai Thambiran appointed by the Pandarasannadhi, and that he should be assisted by a treasurer, a shroff and an auctioneer who was to be appointed once in 3 years by the Court. The Madras Legislature passed Act II of 1927 providing for the good administration of temples and their endowments. The Religious Endowments Board functioning under the said Act, presumably because the administration of the temple in question was satisfactory, did not take any steps to have the scheme framed by the High Court in 1919 modified under the said Act. That Act was substituted by the Madras Hindu Religious and Charitable Endowments Act, 1951 (XIX of 1951), hereinafter called the Act. On 16th June, 1951, the Commissioner, Hindu Religious and Charitable Endowments, Madras, filed a petition in the Court of the Subordinate Judge Mayuram under section 62 (3-a) of the Act for modifying the scheme framed by the High Court. In the petition the Commissioner, after alleging various acts of commission and omission by the Trustee and his subordinates in the management of the temple and pointing out the defects in the earlier scheme, averred that the full income of the Devasthanam had not been secured and safeguarded and that that was attributable mainly to the defective machinery set up under the scheme for the administration of the temple. The most important of the modifications suggested to the scheme was that an Executive Officer should be appointed in the place of the Kattalai Thambiran and the Treasurer, conferring large powers on him for the day-to-day administration of the temple. The Pandarasannadhi filed a counter affidavit denying all the allegations made against the management of the temple and asserting that he had functioned in terms of the scheme and had piloted the temple through difficult times successfully. The learned Subordinate Judge, after considering the entire material placed before him, came to the conclusion that the petitioner had not substantiated any of the allegations made against the Trustee, and that no case had been made out for amending the scheme and for the appointment of an Executive Officer. In the result he dismissed the petition. The State of Madras, represented by the Commissioner of Hindu Religious and Charitable Endowments, Madras, preferred an appeal against the said order to the High Court of Madras. The said appeal came up before a Division Bench of the High Court. In the High Court the learned Government Pleader appearing for the State did not question the correctness of the finding given by the learned Subordinate Judge that there was no proof of mismanagement of any kind by the Pandarasannadhi or the Kattalai Thambiran. The learned Counsel for the Pandarasannadhi had no objection for making formal amendments to the scheme, which became necessary due to lapse of time and due to the passing of the Act. After hearing the parties, the High Court modified the scheme introducing the controversial provision, viz., the appointment of an Executive Officer. In the result, the order of the Subordinate Judge was set aside and the scheme made by the High Court in 1919 was modified. This appeal has been filed, on a certificate issued by the High Court, against the said decree of the High Court.

Mr A V Viswanatha Sastry, learned Counsel for the appellant, contends that the High Court, having agreed with the Subordinate Judge that the Commissioner had failed to establish any of the charges levelled by him against the Trustee, erred in modifying the scheme framed by the High Court in the year 1919 introducing drastic changes therein, such as putting the management of the temple under an Executive Officer who could be appointed and removed only by the Hindu Religious and Charitable Endowments Board and also making a provision for the appointment of additional Trustees in future. He has no objection to that part of the scheme introducing formal changes in the earlier scheme so as to bring it in conformity with the provisions of the Act.

The arguments of Mr. A. Ranganadham Chetty, learned Counsel for the State, may be stated thus : Under the Act a scheme for administration of a temple may be framed or an earlier scheme may be amended not only when there is mismanagement by the Trustee but also for providing for a better administration of the temple. In the present case, though there is no mismanagement by the Trustee, the extensive immovable properties the temple owns, the existence of large arrears of rents, settlement of disputes that may arise between the tenants and the Trustee under the new tenancy laws and such others call for the appointment of a trained Executive Officer by the Commissioner in the best interests of the Temple. That apart, as under the Act the Commissioner is empowered to frame a scheme if he has reason to believe that in the interests of the proper administration of a religious institution a scheme should be settled for the same, his opinion must be given almost a decisive weight by a Court in the matter of amending a scheme.

To appreciate the contentions of the parties it will be convenient at the outset to notice briefly the scheme of the Act. The Act was passed to provide for the proper administration and governance of Hindu Religious and Charitable Endowments and institutions in the State of Madras. It provides for the appointment of 4 classes of authorities, namely, Commissioner, Deputy Commissioners, Assistant Commissioners and Area Committees. The Commissioner is the highest authority in the hierarchy. Subject to the provisions of the Act, the administration of all religious endowments shall be subject to the general superintendence and control of the Commissioner and for the purpose of such control he can pass any orders which he may deem necessary to ensure that such endowments are properly administered and that their incomes are duly appropriated for the purposes for which they were founded or exist. Specific duties have been allotted to the other authorities subject to the overall control of the Commissioner. There are many effective provisions in the Act to ensure proper administration of temples. Trustees have to keep registers for all institutions for the scrutiny of the appropriate authority. They have to furnish accounts and the accounts have to be audited in the manner prescribed in the Act. The Trustees cannot alienate immovable properties or lease the same beyond 5 years without the sanction of the appropriate authority. They have to obey all lawful orders of the appropriate authorities. The service conditions of the office-holders are duly protected. The scales of expenditure have been standardized and a provision is made fixing the fees for *archana* and the apportionment of the same. The Trustees have to prepare budgets and get their accounts audited. There are provisions even for ordering sur-charge against Trustees. All the temples, whether governed by schemes or not, are subject to the said provisions of the Act. Thus, there is a fair amount of financial and administrative control over the Trustees.

The general provisions of the Act may be sufficient in the case of the temples which are properly administered ; but there may be temple without any scheme of administration or even if it has one, it may require to be improved to achieve better results. Section 58 enables a Deputy Commissioner to settle a scheme for an institution if he has reason to believe that in the interests of better administration thereof a scheme should be settled for it. His order framing a scheme is subject to appeal to the Commissioner. Under section 62 of the Act a party aggrieved by the order can file a suit in a Court questioning in the correctness of the same and against the order of that Court an appeal lies to the High Court. Under section 103 (d) of the Act,

“all schemes settled or modified by a Court of law under the said Act (The Madras Hindu Religious Endowments Act, 1926) or under section 92 of the Code of Civil Procedure, 1908, shall be deemed to have been settled or modified by the Court under this Act and shall have effect accordingly.”

Under section 62 (3) of the Act, any scheme modified by a Court under section 62 (2) of the Act or any scheme framed or any scheme deemed under section 103 (d) to have been settled or modified by a Court can at any time be modified or cancelled by a Court on an application made to it by the Commissioner or a Trustee or any person having interest. Any party

aggrieved by any order of the Court under clause (a) of section 62 (3) may within 90 days of the order appeal to the High Court. The effect of these provisions is that though the Deputy Commissioner settles a scheme at the first instance, an aggrieved party can finally go to a civil Court to have the scheme modified. So too, a scheme framed by a Court under section 92 of the Code of Civil Procedure can be modified on an application made to a Court by the Commissioner, Trustee or any person having interest. Before the Act, there was a conflict whether the scheme framed by a Court under section 92 of the Code of Civil Procedure could be modified on an application made by an aggrieved party and that conflict is resolved under the Act by an express provision that it can be so done. Where a temple is so badly mismanaged that the administration cannot be improved by the exercise of ordinary powers under the Act or by framing a scheme, the Commissioner is given the power to notify such a temple and put it under the direct control of an Executive Officer directly responsible to him. This is in the nature of supersession of the ordinary administration of a temple. It is, therefore, clear that under the Act the administration of all temples is subject to the exercise of the powers conferred upon the authorities thereunder. The Deputy Commissioner can settle a scheme for the proper administration of a temple. If the administration of a temple is very bad it can be superseded and the temple notified for a prescribed period. From the scheme of the said provisions we do not see any justification for the argument of the learned Counsel for the State that the Court shall accept without scrutiny the view of the Deputy Commissioner that the scheme requires modification in the manner suggested by him and that the formal approval by the Court is all that is contemplated thereunder. While we appreciate the argument that a Court shall have due regard to the views of the Commissioner or the Deputy Commissioner as the case may be, who is in close touch with the administration of temples, we cannot persuade ourselves to hold that the Court is relieved of its duty of ascertaining the necessity for framing a scheme or to find out the propriety or advisability of the various clauses of a scheme. In framing a scheme, the Deputy Commissioner and, in a suit or application for amendment of a scheme, the Court will mould the relief under section 58 (2) of the Act having regard to the circumstances of each case. Section 58 (2) of the Act reads

"A scheme settled under sub-section (1) for a temple or for a specific endowment other than one attached to a math may contain provision for—

- (a) removing any existing trustee, whether hereditary or non hereditary,
- (b) appointing a new trustee or trustees in the place of or in addition to any existing trustee or trustees,
- (c) defining the powers and duties of the trustee or trustees,
- (d) appointing or directing the appointment of a paid executive officer who shall be a person professing the Hindu religion, on such salary and allowances as may be fixed to be paid out of the funds of the institution and defining the powers and duties of such officer.

The Deputy Commissioner, the Commissioner or the Court, as the case may be, is not bound, in framing a scheme, to appoint an Executive Officer in every case, but a case will have to be made out for appointing him that depends upon the facts established in each case.

With this background let us look at the scheme framed by the High Court. The scheme is made a part of the judgment of the High Court. The clauses of the scheme read thus:

"(1) The temple of Sri Vaidyanathaswami at Vaidyantharankol, Shiyal Taluk and the shrines and minor temples attached thereto and charities and endowments thereof, together comprise the "Vaidhar Devasthanam", and it shall be governed by the provisions of Act XIX of 1951 and the Rules made thereunder.

(2) The properties, movables and immovables belonging to the Devasthanam and that may hereafter be acquired by the Devasthanam shall vest in the deity of Sri Vaidyanathaswami.

(3) The administration of the Devasthanam and its properties, shall vest in the Pandarasanadhi at the Dasrampuram Adhanam for the time being who shall be the "trustee" of the Devasthanam.

(4) On the application of the Commissioner the Court shall have the power to add two additional trustees if at some future time it is found that it is necessary to do so in the interest of the Devasthanam on account of the mismanagement by the Pandarasanadhi, the Trustee.

(5) All the affairs of the Devasthanam, such as the receipt of income, incurring of expenditure, management of the property, the performance of the worship and the festivals of the temple, bringing and defending suits on behalf of the Devasthanam, shall be conducted by the Executive Officer under the supervision of the trustee, the mamool religious functions of the Kattalai Thambiran being reserved.

(6) The Trustee shall in April every year prepare a budget of the income and expenditure and such budget will be governed by the provisions of Madras Act XIX of 1951. The Trustee shall be given a discretion to spend any amount not exceeding Rs. 2,000 (Rupees two thousand) every year in addition to the budgeted expenditure.

(7) (a) The Trustee shall from out of the five names sent to him by the Commissioner choose one of them for appointment as the Executive Officer of the Devasthanam and such person shall be appointed by the Commissioner as Executive Officer and shall be in management of the Devasthanam and its properties in the day-to-day administration including the maintenance of accounts, keeping of records, making collections and disbursements, and shall have the control of the temple servants.

(b) The Executive Officer shall be a First Class Executive Officer, and shall be paid such salary and employed on such terms as the Commissioner may from time to time prescribe and his powers and duties shall be regulated by Madras Act XIX of 1951 and the Rules framed hereunder.

(8) The Pandarasannadhi shall select from among the Thambirans of the Dha mapuram Adhinam a Kattalai Thambiran competent to do the religious functions of the Trustee. The Pandarasannadhi will be responsible for all acts of the Kattalai Thambiran as a master for the acts of the servant.

(9) The Kattalai Thambiran shall attend to the performance in proper manner and in proper times of the daily pujas and worship and of the monthly and yearly festivals of the Devasthanam under the supervision and direction of the Executive Officer.

(10) (a) The *malam* building belonging to the Devasthanam in Vaitheeswarankoil shall be set apart for the residence of the Kattalai Thambiran and a sum of Rs. 50 a month shall be paid to him for his maintenance and personal expenses. He will also be entitled to the enjoyment of one *veli* of *maniam* land as in the pre-scheme days.

(b) The present treasurer and shroff will continue in office on the present scale of pay and they shall work under the directions of the Executive Officer and shall, do such work as is assigned to them. The future treasurer and shroff will be appointed by the Commissioner. The old scale of salary of the treasurer is reduced to the present scale of Rs. 100—5—125.

(11) The Executive Officer shall, with the permission of the Commissioner, sell in public auction the jewels and ornaments gold and silver coins not in circulation and other metallic objects in the hundials except current coins and any other offerings.

(12) The Trustee shall place one or more hundials, as occasions might require, for the deposit of voluntary and compulsory offerings by the worshippers. Each hundial shall be of copper brass or any other materials and shall have metallic covering with an aperture. Each of such hundials shall be under double lock and sealed by the Trustee and the Executive Officer. One set of keys shall be with the Executive Officer and other set with the Trustee. The hundials shall be opened every day or at such intervals as the Trustee may direct in the presence of the Executive Officer and the Kattalai Thambiran and the worshippers of the temple and the collections shall be kept by the Executive Officer.

(13) In the matter of accounts, preparing abstracts, and receipts and disbursement of the Devasthanam as also of preparation publication and audit of accounts, the Executive Officer and the Trustee shall observe the procedure prescribed in Madras Act XIX of 1951 and the Rules made thereunder.

(14) The accounts of the Devasthanam shall be open to inspection by any person having interest on his giving one day's previous notice to the Executive Officer and paying a fee of Rs. 5 for each day or part of a day in advance of such inspection. The person so inspecting may bring to the notice of the Commissioner any irregularity and the Commissioner may pass such orders as he may think necessary.

(15) All the records of the Devasthanam shall be kept in proper order in the premises of the Devasthanam provided for the purpose in Vaitheeswarankoil, and an accurate list of all records should be maintained. There shall be a record-keeper who shall be in charge of all the records and he shall not allow any record to be taken out without the written authority of the Executive Officer and without getting proper vouchers.

(16) Power is reserved to the Trustee to apply to the Commissioner for permission to use the surplus funds on such religious and charitable and other purposes as may tend to promote the cause of the institution such as an Agama Patasala or Thevara Patasala or Adhyayana Patasala or such other purposes as are prescribed by the Act.

(17) The Trustee shall have the discretion to make jewels, valanams, etc. or to do thiruppani work for the Devasthanam out of the surplus income of each year after obtaining the sanction of the Commissioner and in accordance with the provisions of Act XIX of 1951 and the Rules made thereunder. The Trustee shall have a discretion to spend Rs. 2,000 annually over and above the sanctioned amount if necessary and if funds are available.

(18) The Trustee may with the sanction of the Commissioner invest the surplus funds of the Devasthanam in such manner as is prescribed under Madras Act XIX of 1931 and the Rules made thereunder.

(19) There shall be no money dealings or transactions between the Devasthanam Trustee and the Adhnam or any of the Kattalai charities or trusts managed by the Pandarasannadhi of Dharmapuram or any person under his orders.

(20) Save as expressly provided herein the administration of the temple shall be governed by the provisions of the Madras Act XIX of 1931 and the Rules made thereunder."

It will be seen from the aforesaid provisions of the scheme that it introduces an Executive Officer to be appointed by the Commissioner and removable by him; his salary is fixed by the Commissioner and his powers and duties are regulated by the Act and the Rules framed thereunder. In substance, he is a servant of the Commissioner and is under his control. He is to be in charge of the entire administration of the temple. Nothing can be done in the temple without his permission. It is true that he functions under the supervision of the Trustee; but there is an essential distinction between supervision and management. If the Executive Officer disobeys him, the Pandarasannadhi cannot do anything, except perhaps to complain to the Commissioner. Such a drastic provision may be necessary in a case where the temple is mismanaged or if there are other circumstances which compel such an appointment. But there is concurrent finding of fact in this case that the Commissioner has failed to establish any of the charges levelled by him against the Trustee. It is not, therefore, possible to hold that any case has been made out for the appointment of an Executive Officer who practically displaces the Trustee.

Mr. A. Ranganadham Chetty says that the appointment of the Executive Officer is necessary in view of the great things which have to be done in the temple, like sale of 3,000 acres of land to the tenants under the new legislation at agreed prices, checking cash collections, including the hundial collections, doing away with the *ad hoc* auctioneers appointed by the Commissioner from time to time, and for auctioning leases, and all kinds of properties like jewellery, lands, etc. We have no material before us to find out what is the complicated and difficult action the Trustee has to take in the matter of selling 3,000 acres of land to the tenants, under the new legislation at agreed prices. If there is any such difficulty, the Commissioner has ample powers under the Act to issue orders or at any rate advise the Trustee in the matter of disposal of such lands. Other difficulties are not such as to necessitate the appointment of an Executive Officer practically displacing the Trustee. Further it appears from the record that the present Kattalai Thambiran is a legally qualified person and he can ordinarily be expected to look after these things with appropriate expert advice. We do not think any case had been made out for the appointment of the Executive Officer.

The next objection raised by Mr. Viswanatha Sastry relates to clause (4) of the scheme, which reads :

"On the application of the Commissioner, the Court shall have the power to add two additional trustees if at some future time it is found that it is necessary to do so in the interest of the Devasthanam on account of the mismanagement by the Pandarasannadhi, the Trustee."

Clause (4) of the scheme only confers a power and it does not direct the appointment of additional trustees *in presents* or even *in futuro*. Indeed, section 39 of the Act was amended in 1954 whereunder such a power is conferred even on the Commissioner. We do not think the appellant is in any way prejudiced by the said clause. Therefore, it may stand. As we are deleting the clause appointing the Executive Officer, there will be consequential amendments in the various clauses of the scheme framed by the High Court.

It is brought to our notice that in 1959 the Madras Hindu Religious and Charitable Endowments Act (XXII of 1959) was passed by the Madras Legislature. Under section 45 thereof, the Commissioner is given a plenary power to appoint an Executive Officer to any temple and, therefore, it is argued, this Court shall not interfere with the clause of the scheme providing for the appoint-

ment of an Executive Officer to the temple in question. The said Act was passed subsequent to the filing of the suit. We are deciding this appeal on the basis of the circumstances obtaining in the year 1951 when the suit was filed. It may be that under the new Act the Commissioner has higher powers than he had under the 1951 Act and subsequent events may call for the exercise of those powers. Our judgment will not preclude the Commissioner to take any action under the new Act as the circumstances demand. With these observations we shall proceed to modify the scheme framed by the High Court.

In the scheme framed by the High Court, clauses, (1), (2), (3), 4, (6), 10 (a), (16), (17), (18), (19) and (20) will be retained ; clause (7) will be deleted ; and the other clauses will be amended as under :

" Clause (5).—The words " the Executive Officer under the supervision of " will be omitted.

Clause (8).—The word " religious " will be omitted.

Clause (9).—The words " under the supervision and direction of the Executive Officer " will be omitted.

Clause (10) (b) shall read :

The Treasurer and shroff will continue in office on the present scale of pay, and they shall work under the directions of the Trustees.

Clause (11).—The words " Executive Officer " shall be replaced by the word " Trustee. "

Clause (12) shall read :

The Trustee shall place one or more hundials, as occasions might require, for the deposit of voluntary and compulsory offerings by the worshippers. Each hundial shall be of copper brass or any other materials, and shall have metallic covering with an aperture. Each of such hundials shall be under double lock and sealed by the Trustee or his nominee and the Kattalai Thambiran. One set of keys shall be with the Kattalai Thambiran and the other set with the Trustee or his nominee. The hundials shall be opened every day or at such intervals as the Trustee may direct in the presence of the Kattalai Thambiran and the worshippers of the temple and the collections shall be kept by the Trustee.

Clause (13).—The words " Executive Officer " will be substituted by the words " Kattalai Thambiran. "

Clause (14).—The words " Executive Officer " will be substituted by the words " Kattalai Thambiran. "

Clause (15).—The words " Executive Officer " will be substituted by the words " Kattalai Thambiran. "

In the result, the decree of the High Court is modified as aforesaid. The parties will bear their respective costs throughout.

V.S.

*Modified accordingly.*

## THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—K. N. WANCHOO, M. HIDAYATULLAH, J. C. SHAH, J. R. MUDHOLKAR AND S. M. SIKRI, JJ.

Mangaldas Raghavji Ruparel and others

.. *Appellants\**

v.

The State of Maharashtra and another

.. *Respondents.*

*Prevention of Food Adulteration Act (XXXVII of 1954), section 2 (xii)—" Sale"—Includes sale to Food Inspector for analysis—Mens rea—Defence of section 16 (1) (a) read with section 7 (v)—Prosecution for offences under—Certificate of Public Analyst—If sufficient to his conviction—Joint trial of wholesaler of Bombay and retail seller of Nasik—Legality—Criminal Procedure Code (V of 1898), sections 537 (b) and 182—Scope.*

M, a wholesale dealer, doing business at Bombay despatched through a public carrier a bag of haldi (turmeric powder) to D, a grocer at Nasik. It was received on behalf of D by K at the octroi post of Nasik Municipality after paying the duty. A Food Inspector purchased 12 oz. the powder contained in the bag for purposes of analysis. As the analysis revealed that the powder was adulterated M, D and K were proceeded against for offences under section 16 (1) (a) read with section 7 (v) of the Prevention of Food Adulteration Act and they were convicted. The conviction was confirmed by the High Court. On appeal by Special Leave,

*Held*, (1) Section 537 (b) of the Code of Criminal Procedure provides that no judgment, conviction or sentence can be held to be vitiated by reason of misjoinder of parties unless prejudice has resulted



to the accused thereby. For determining whether failure of justice has resulted the Court is required by the Explanation to section 537 to have regard to the fact that the objection had not been raised at the trial. Unless it is so raised it would be legitimate to presume that the accused apprehended no prejudice.

(2) M's trial at Nasik was within jurisdiction. Under section 182 of the Code of Criminal Procedure where it is uncertain in which of the local areas an offence was committed or where the offence is committed partly in one local area and partly in another or where an offence is a continuing one and continues to be committed in more local areas than one or where it consists of several acts done in different local areas, it may be inquired into or tried by a Court having jurisdiction over any of such local areas. Since M actually sent the bag from Bombay to Nasik he could be said to have committed the offence partly in Bombay from where it was despatched and partly in Nasik to which place it had been consigned. Apart from that, the mere fact that proceedings were taken in a wrong place would not vitiate the trial unless it appears that this has occasioned a failure of justice (see section 531 Criminal Procedure Code).

(3) The Report of the Public Analyst is admissible in evidence under section 15 (6) of Prevention of Food Adulterations Act. What value is to be attached to such report must necessarily be for the Court of fact which has to consider it. It is true that the certificate of the Public Analyst is not made conclusive but this only means that the Court of fact is free to act on the certificate or not, as it thinks fit. A Court of fact can legally act solely on the basis of the report of the Public Analyst.

(4) Section 19 (1) of the Prevention of Food Adulteration Act clearly deprives the vendor of the defence of merely alleging that he was ignorant of the nature, substance or quality of the article of food sold by him and thus places upon him the burden of showing that he had no *mens rea* to commit an offence under section 17 (1) of the Act.

(5) We have a special definition of sale in the Prevention of Food Adulteration Act in section 2 (zu) which specifically includes within its ambit a sale for analysis. *Food Inspector v Parameswaran* 1962 (1) Cr L J 452. In re *Ballantyne Kanakayya* AIR, 1942 Mad 609 overruled. *State v. Amritha Bhogdal* ILR (1951) Bom 459 and *Public Prosecutor v Dada Haji Ebrahim Halar*, AIR 1953 Mad 241 approved.

Appeals by Special Leave from the Judgment and Order dated 19th April, 1963 of the Bombay High Court in Criminal Appeal No. 988 of 1962.

*V. B. Ganatra and I. N. Shroff*, Advocates, for Appellant (In Criminal Appeal No. 57 of 1963).

*Frank Anthony, E. C. Agarwala and P. C. Agrawala*, Advocates, for Appellants (In Criminal Appeal No. 113 of 1963).

*S. G. Patwardhan*, Senior Advocate (*B. R. G. K. Achar*, Advocate, with him), for Respondent-State (In both the Appeals).

The Judgment of the Court was delivered by

*Mudholkar, J.*—This appeal and Criminal Appeal No. 113 of 1963 arise out of a joint trial of the appellant Mangaldas, and the two appellants Daryanomal and Kodumal in Cr.L.A. No. 113 of 1963 for the contravention of section 7 (v) of the Prevention of Food Adulteration Act, 1954 (hereinafter referred to as the Act) in which they were convicted and sentenced under section 16 (1) (a) of the Act. The appellants Mangaldas and Daryanomal were each sentenced under section 16 (1) (a) (ii) of the Act to undergo rigorous imprisonment for six months and to pay a fine of Rs. 500 while the other appellant was sentenced under sub-clause (i) to undergo imprisonment until the rising of the Court and to pay a fine of Rs. 200. On appeal they were all acquitted by the Additional Sessions Judge, Nasik. The State preferred an appeal before the High Court of Bombay which allowed it and restored the sentences passed on Mangaldas and Daryanomal by the Judicial Magistrate but imposed only a fine of Rs. 200 on Kodumal. They have come up to this Court by Special Leave.

The admitted facts are these. Mangaldas is a wholesale dealer, commission agent, exporter, supplier and manufacturer of various kinds of spices doing business at Bombay. Daryanomal is engaged in grocery business at Nasik while Kodumal is his servant. On 7th November, 1960, Daryanomal purchased from Mangaldas a bag of haldi (turmeric powder) weighing 75 kg. which was despatched by the latter through a public carrier. It was received on behalf of Daryanomal at 11-45 A.M.

on 18th November, 1960 by Kodumal at the octroi post of Nasik Municipality. After he paid the octroi duty to the Nasik Municipality and took delivery of the bag the Food Inspector Burud purchased from him 12 oz. of turmeric powder contained in that bag for the purpose of analysis. The procedure in this regard which is laid down in section 11 of the Act was followed by Burud. A portion of the turmeric powder was sent to the Public Analyst at Poona, whose report Exhibit 16, shows that the turmeric powder was adulterated food within the meaning of section 2 (1) of the Act. Thereupon Burud after obtaining the sanction of the Officer of Health of the Municipality, filed a complaint against the appellants in the Court of the Judicial Magistrate for offences under section 16 (1) (a) read with section 7 (v) of the Act. At the trial Kodumal admitted that he had taken delivery of the bag at the octroi post and sold 12 oz. of turmeric powder to the Food Inspector and that he had also received a notice from him under section 11 of the Act. It was contended at the trial on behalf of Daryanomal that actually no delivery had been taken but that point was not pressed before the High Court. While Mangaldas admitted that he had sold and despatched the bag containing turmeric powder he contended that what was sent was not turmeric powder used for human consumption but was "Bhandarc" which is used for religious purposes or for applying to the forehead. This contention was rejected by the Judicial Magistrate as well as by the High Court but was not considered by the Additional Sessions Judge. It was sought to be challenged before us by Mr. Ganatra on his behalf but as the finding of the High Court on the point is upon a question of fact we did not permit him to challenge it.

We will take Mangaldas's case first. Mr. Ganatra had made an application on his behalf for raising a number of new points, including some alleged to raise constitutional questions. At the hearing, however, he did not seek to urge any question involving the interpretation of the Constitution. The new points which he sought to urge were :

- (1) that the appellant was not questioned regarding the report of the Public Analyst ;
- (2) the joint trial of Mangaldas with the other two appellants was illegal; and
- (3) that the sanction was not valid.

As regards the first of these points his contention is that he had raised it before the High Court also though it has not referred to in its judgment. The High Court has stated clearly that all the points raised in argument before it were considered by it. In the face of this statement we cannot allow the point to be urged before us.

As regards the second point it is sufficient to say that it was not raised before the Magistrate. Section 537 (b) of the Code of Criminal Procedure provides that no judgment, conviction or sentence can be held to be vitiated by reason of mis-joinder of parties unless prejudice has resulted to the accused thereby. For determining whether failure of justice has resulted the Court is required by the *Explanation* to section 537 to have regard to the fact that the objection had not been raised at the trial. Unless it is so raised it would be legitimate to presume that the accused apprehended no prejudice. The point thus fails.

As regards the alleged invalidity of sanction it is sufficient to point out that the contention was not raised in the High Court or earlier. We, therefore, decline to consider it.

Mr. Ganatra urged that the trial Court had no jurisdiction to try the appellant as the appellant had not committed any offence within its jurisdiction. With regard to this point the High Court has held that Mangaldas had distributed the commodity within the jurisdiction of the Magistrate and, therefore, the Magistrate had jurisdiction to try him. Apart from that we may point out that under section 182 of the Code of Criminal Procedure where it is uncertain in which of the local areas an offence was committed or where the offence is committed partly in one local

area and partly in another or where an offence is a continuing one and continues to be committed in more local areas than one or where it consists of several acts done in different local areas, it may be inquired into or tried by a Court having jurisdiction over any of such local areas. Since Mangaldas actually sent the bag from Bombay to Nasik he could be said to have committed the offence partly in Bombay from where it was despatched and partly in Nasik to which place it has been consigned. Apart from that, the mere fact that proceedings were taken in a wrong place would not vitiate the trial unless it appears that this has occasioned a failure of justice (see section 531, Criminal Procedure Code). Mr. Ganatra, however, says that there was failure of justice in this case because had Mangaldas been prosecuted at Bombay, one of the samples taken from the bag of turmeric powder would have been sent to the Public Analyst at Bombay and not to the Public Analyst at Poona. We are wholly unable to appreciate how this could make any difference whatsoever. Apart from that since the samples were actually taken at Nasik the one meant for analysis had according to an administrative order of the Government, to be sent to the Public Analyst at Poona. Therefore, even if Mangaldas had been tried at Bombay the report of the Public Analyst at Poona could be put in evidence. There is nothing in the Act which prevents that from being done.

In view of the fact that the finding of the Judicial Magistrate and the High Court that the turmeric powder had been adulterated was based solely on the report of the Public Analyst, Mr. Ganatra raised three contentions before us. One is that such evidence is not by itself sufficient for the conviction of an accused person, the second is that the Public Analyst was not called as a witness in the case and the third is that unless notice is given to an accused person under section 11 of the Act after a sample had been taken of the allegedly adulterated commodity, the report of the Public Analyst concerning that commodity is not admissible against him.

In support of the contention that the conviction could not be based solely upon the report of the Public Analyst that the turmeric powder was adulterated Mr. Ganatra relied upon the decisions in *State v. Bhausa Hamalsa Pawar*<sup>1</sup>, and *City Corporation Tirandrum v. Antony*<sup>2</sup>. The first of these is a case under the Bombay Prohibition Act 1949 (Bombay Act XXV of 1949). In that case a large quantity of *angurasara*, partly contained in two barrels and partly in three boxes containing 109 bottles was recovered from the house of the accused person. Samples taken from the barrels and boxes were sent for analysis to the Chemical Analyser and to the Principal, Podar Medical College, Bombay. The report of the former showed that three out of the four samples contained alcohol in varying degrees. Thereupon the accused was prosecuted for offences under sections 65, 66 (b) and 83 (1) of the Bombay Prohibition Act. His defence was that he manufactures a medicinal preparation called *angurasara* which contains Ayurvedic ingredients which generate alcohol. According to him therefore, what was seized from him was outside the ambit of the Bombay Prohibition Act. Partly relying upon the certificate issued by the Principal of Podar Medical College the trying Magistrate acquitted the accused holding that the prosecution had failed to discharge the onus of proof that *angurasara* is prohibited liquor. On appeal by the State of Maharashtra before the High Court reliance was placed upon the certificates issued by the Chemical Analyser as well as by the Principal Podar Medical College. The certificate of the former showed that three out of the four samples contained

"2.2 and 6%, v/v of ethyl alcohol respectively and they contain yeast. No alkaloid or m-toluidic poison was detected in them."

The certificate of the Principal of the Podar Medical College is as follows:

\* Formula supplied is found to be similar to that given in the Ayurvedic books. There are not easy methods to find out the herbal drugs dissolved in a liquid. It is not possible for us to find out the herbal drugs used in the above liquids. The colour and smell of the samples supplied is not identical with the colour and smell of fermented Ayurvedic preparation like *Asava* and *Arishta*. Hence it is very difficult to give any definite opinion in the matter."

On behalf of the accused it was urged that by virtue of sub-section (ii) of section 24 (a) of the Prohibition Act, the provisions of sections 12 and 13 thereof do not apply to any medicinal preparation containing alcohol which is unfit for use as intoxicating liquor. Section 12 of the Act prohibits the manufacture and possession of liquor and section 16 prohibits the possession of materials for the manufacture of liquor. It was, however, contended on behalf of the State that once it is established that what was seized from the possession of the accused contains alcohol the burden of proving that what was seized falls under section 24 (a) was on the accused person. The High Court, however, held that the burden of establishing that a particular article does not fall under section 24 (a) rests on the prosecution. In so far as the certificate of the Chemical Analyst was concerned the High Court observed as follows :

"It is beyond controversy that, normally, in order that a certificate could be received in evidence, the person who has issued the certificate must be called and examined as a witness before the Court. A certificate is nothing more than a mere opinion of the person who purports to have issued the certificate, and opinion is not evidence until the person who has given the particular opinion is brought before the Court and is subjected to the test of cross-examination."

It will thus be clear that the High Court did not hold that the certificate was by itself insufficient in law to sustain the conviction and indeed it could not well have said so in view of the provisions of section 510, Criminal Procedure Code. What the High Court seems to have felt was that in circumstances like those present in the case before it, a Court may be justified in not acting upon a certificate of the Chemical Analyst unless that person was examined as a witness in the case. Sub-section (1) of section 510 permits the use of the certificate of a Chemical Examiner as evidence in any enquiry or trial or other proceeding under the Code and sub-section (2) thereof empowers the Court to summon and examine the Chemical Examiner if it thinks fit and requires it to examine him as a witness upon an application either by the prosecution or the accused in this regard. It would, therefore, not be correct to say that where the provisions of sub-section (2) of section 510 have not been availed of the report of a Chemical Examiner is rendered inadmissible or is even to be treated as having no weight. Whatever that may be we are concerned in this case not with the report of a Chemical Examiner but with that of a Public Analyst. In so far as the report of the Public Analyst is concerned we have the provisions of section 15 of the Act. Sub-section (6) of that section provides as follows :

"Any document purporting to be a report signed by a Public Analyst, unless it has been superseded under sub-section (3), or any document purporting to be a certificate signed by the Director of the Central Food Laboratory, may be used as evidence of the facts stated therein in any proceeding under this Act or under sections 272 to 276 of the Indian Penal Code :

Provided that any document purporting to be a certificate signed by the Director of the Central Food Laboratory shall be final and conclusive evidence of the facts stated therein."

This provision clearly makes the report admissible in evidence. What value is to be attached to such report must necessarily be for the Court of fact which has to consider it. Sub-section (2) of section 13 gives an opportunity to the accused vendor or the complainant on payment of the prescribed fee to make an application to the Court for sending a sample of the allegedly adulterated commodity taken under section 11 of the Act to the Director of Central Food Laboratory for a certificate. The certificate issued by the Director would then supersede the report given by the Public Analyst. This certificate is not only made admissible in evidence under sub-section (5) but is given finality of the facts contained therein by the proviso to that sub-section. It is true that the certificate of the Public Analyst is not made conclusive but this only means that the Court of fact is free to act on the certificate or not, as it thinks fit.

Sub-section (5) of section 13 of the Act came for consideration in *Antony's case*<sup>1</sup> upon which the State relied. There the question was whether a sample of buffalo's milk taken by the Food Inspector was adulterated or not. The Public Analyst to whom it was sent submitted the following report.

"I further certify that I have analysed the aforementioned sample and declare the result of my analysis to be as follows :

Solids-not-fat	9 00 per cent.
Fat	5 4 per cent.
Freezing point	0
(Hortvet's method)	0 49

and am of the opinion that the said sample contains not less than seven per cent (7 %) of added water as calculated from the freezing point (Hortvet's method) and is therefore adulterated "

The Magistrate who tried the accused persons acquitted them on the ground that it was not established that the milk was adulterated. Before the High Court it was contended that the certificate was sufficient to prove that water had been added to the milk and reliance was placed upon the provisions of section 13 (5) of the Act. The learned Judge who heard the appeal observed that this provision only says that the certificate may be used as evidence but does not say anything as to the weight to be attached to the report. The learned Judge then proceeded to point out what according to him should be the contents of such report and said :

" In this case the Court is not told what the Hortvet's test is, what is the freezing point of pure milk and how the calculation has been made to find out whether water has been added. I cannot, therefore, say that the Magistrate was bound to be satisfied on a certificate of this kind which contains only a reference to some test and a finding that water has been added. The prosecution could have examined the Analyst as a witness on their side. The learned Magistrate also could very well have summoned and examined the Public Analyst, but whatever that might be, I am not prepared to say that the finding of the Magistrate that the case has not been satisfactorily proved is one which could not reasonably have been reached by the learned Magistrate and that the actuality is wrong and calls for interference " (p 436 )

All that we would like to say is that it should not have been difficult for the learned Judge to satisfy himself by reference to standard books as to what Hortvet's method is and what the freezing point of milk is. We fail to see the necessity of stating in the report as to how the calculations have been made by the Public Analyst. Apart from that it is clear that this decision does not support the contention of learned Counsel that a Court of fact could not legally act solely on the basis of the report of the Public Analyst.

As regards the failure to examine the Public Analyst as a witness in the case no blame can be laid on the prosecution. The report of the Public Analyst was there and if either the Court or the appellant wanted him to be examined as a witness appropriate steps would have been taken. The prosecution cannot fail solely on the ground that the Public Analyst had not been called in the case. Mr. Ganatra then contended that the report does not contain adequate data. We have seen the report for ourselves and quite apart from the fact that it was not challenged by any of the appellants as inadequate when it was put into evidence, we are satisfied that it contains the necessary data in support of the conclusion that the sample of turmeric powder examined by him showed adulteration. The report sets out the result of the analysis and the tests performed in the Public Health Laboratory. Two out of the three tests and the microscopic examination revealed adulteration of the turmeric powder. The microscopic examination showed the presence of pollen stalks. This could well be regarded as adequate to satisfy the mind of a Judge or Magistrate dealing with the facts. Mr. Ganatra then said that the report shows that the analysis was not made by the Public Analyst himself but by someone else. What the report says is " I further certify that I have caused to be analysed the aforementioned sample and declare that result of the analysis to be as follows." This would show that what was done was under the supervision of the Public Analyst and that should be regarded as quite sufficient.

Now as to the necessity of notice under section 11 of the Act, Mr. Ganatra said that the report is admissible only against a person to whom notice is given under section 11 (1) (a) by the Food Inspector, that the object of taking the sample was to have it analysed. The law requires notice to be given only to the person from whom the sample is taken and to none else. The object of this provision is clearly to apprise the person from whom the sample is taken of the intention of the Food Inspector so that he may know that he will have the right to obtain from the Food Inspector a part of the commodity taken by way of sample by the Food Inspector.

This is with a view to prevent a plea from being raised that the sample sent to the Analyst was of a commodity different from the one from which the Food Inspector has taken a sample. What bearing this provision has on the admissibility of the evidence of the Public Analyst is difficult to appreciate. Once the report of the Analyst is placed on record at the trial it is admissible against all the accused persons. What it shows in the present case is that the commodity of which Kodumal had taken possession contained turmeric powder which was adulterated. Therefore, since it is admitted and also established that the bag of turmeric powder from which sample was taken had been despatched by the appellant Mangaldas, the report of the Public Analyst could be properly used against him in regard to the quality or composition of the commodity.

Mr. Ganatra then said that it was necessary to establish that the appellant had the *mens rea* to commit the offence. In support of his contention Mr. Ganatra pointed out that section 19 (1) of the Act deprives only the vendor of the right to contend that he was ignorant of the nature, substance or quality of the food sold by him and not a person in Mangaldas's position. According to him, the word 'Vendor,' here means the person from whom the sample was actually taken by the Food Inspector. We cannot accept the contention. The word "Vendor," though not defined in the Act, would obviously mean the person who had sold the article of food which is alleged to be adulterated. Mangaldas having sold the bag to Daryanomal, was the original vendor and, therefore, though the sample was taken from Kodumal he will equally be barred from saying that he was not aware of the nature, substance or quality of the turmeric powder in question. Moreover, it is curious that a person who sought to get out by saying that what he had actually sent was not an article of food but something else should now want to say that he did not know that though it was an article of food it was adulterated.

We may now refer to two decisions upon which learned Counsel relied in support of his contention. The first is *Municipal Board, Bareilly v. Ram Gopal*<sup>1</sup>. There the question was whether a shop-keeper who allowed the owner of adulterated ghee to sell on his premises was entitled to say in defence that he was ignorant of the quality of ghee which its owner was offering for sale. It was held by the Allahabad High Court that he was so entitled. We fail to appreciate how this case is of any assistance in the matter before us. For, here, the turmeric powder admittedly once belonged to Mangaldas and was in fact sold by him to Daryanomal. At one stage, therefore Mangaldas was the vendor of the turmeric powder and, therefore, falls squarely within the provisions of section 13 (1) of the Act. The second case is *Ravula Hariprasada Rao v. The State*<sup>2</sup>. What was held in that case is that unless a statute either clearly or by necessary implication rules out *mens rea* as a constituent part of the crime, a person should not be found guilty of an offence against the criminal law unless he has got a guilty mind. The proposition there stated is well established. Here section 19 (1) of the Act clearly deprives the vendor of the defence of merely alleging that he was ignorant of the nature, substance or quality of the article of food sold by him and this places upon him the burden of showing that he had no *mens rea* to commit an offence under section 17 (1) of the Act. In a recent case—*State of Maharashtra v. Mayer Hans George*<sup>3</sup> this Court had to consider the necessity of proving *mens rea* in regard to an offence under section 23 (1) (a) of the Foreign Exchange Regulation Act (VII of 1947) read with notification dated 8th November, 1962, of the Reserve Bank of India. The majority of Judges constituting the Bench held that on the language of section 8 (1) read with section 24 (1) of the above Act, the burden was upon the accused of proving that he had the requisite permission of the Reserve Bank of India to bring gold into India and that there was no scope for the invocation of the rule that besides the mere act of voluntarily bringing gold into India any further mental condition or *mens rea* is postulated as necessary to constitute an offence referred to in section 23 (1-A) of the above Act. We are, therefore, unable to accept the contention of learned Counsel.

1. (1940) 42 Cr.L.J. 243.

2. (1951) S.C.J. 296 : (1951) 1 M.L.J. 612 : 248.

1951 S.C.R. 322.

3. (1966) 1 S.C.J. 363 : (1966) M.L.J. (Cr.)

The only other point which falls for consideration is the one raised by Mr Anthony in the other appeal. Mr Ganatra did not address any separate argument on this point but he adopted what was said by Mr Anthony. That point is whether the transaction in question *ie*, taking of a sample by a Food Inspector under section 11 amounts to a "sale" and, therefore, whether the person connected with the transaction could be said to have infringed section 7 (v) of the Act. Mr Anthony's contention is that for a transaction to be a sale it must be consensual sale. Where a person is required by the Food Inspector to sell to him a sample of a commodity there is an element of compulsion and, therefore, it cannot be regarded as sale. In support of the contention he has placed reliance upon the decision in *Food Inspector v Parameswaran*<sup>1</sup> Raman Nayar, J, who decided the case has observed therein

"As sale is a voluntary transaction and a seizure or compulsory acquisition in exercise of statutory power is not a sale within the ordinary sense of that word. Nor does the definition of 'sale' in section 2 (x u) as including a sale of food for analysis make it one for, the first requisite even under the definition is that there must be a sale. The definition apparently by way of abundant caution, merely states that the word sale means a manner of sales of food whether for cash or on credit or by way of exchange and whether by wholesale or retail, for human consumption or use or for analysis and all that the definition means in relation to the question we are considering is that a sale of food is nonetheless a sale by reason of the fact that it was not for consumption or use, but only for analysis.

In my view when a Food Inspector obtains a sample under section 10 of the Act there is no sale of course. It is possible for a Food Inspector just like any other human being to effect a purchase in the ordinary course and the transaction would be a sale notwithstanding that the purchaser is a Food Inspector and that his purpose is to have the article analysed with a view to prosecution. But if he obtains the article not by a voluntary exchange for a price but in exercise of his statutory power under section 10 of the Act the transaction is not a sale notwithstanding that in obedience to sub-section (3) of section 10 its cost—and I think the sub-section advisedly uses the long phrase "its cost calculated at the rate at which the article is usually sold to the public" instead of the word price—is paid to the person from whom the sample is taken.

In *Sargoo Prasad v The State of Uttar Pradesh*<sup>2</sup>, *M V. Joshi v M U Shimp*<sup>3</sup> and *The State of Uttar Pradesh v Kartar Singh*<sup>4</sup>, this Court has treated a transaction of the kind we have here as a sale. No doubt, no argument was addressed in any of these cases before this Court similar to the one advanced by Mr Anthony in this case and as advanced in *Parameswaran's case*<sup>1</sup>.

A view contrary to the one taken in *Parameswaran's case*<sup>1</sup>, was taken in *State v Amritlal Bhoglal*<sup>5</sup> and *Public Prosecutor v Dada Haji Ebrahim Helari*<sup>6</sup>. In both these cases the sale was to a Sanitary Inspector who had purchased the commodity from the vendor for the purpose of analysis. It was contended in these cases that the transaction was not of a voluntary nature and, therefore, did not amount to a sale. This contention was rejected. In *Amritlal Bhoglal's case*<sup>5</sup> the learned Judges held

"There is also no reason why in such a case the article should not be held to have been sold to the Inspector within the meaning of section 4 (1) (a). He has paid for the article purchased by him like any other customer. Moreover section 11 itself uses the words 'purchase' and 'sell' in regard to the Inspector's obtaining an article for the purpose of analysis and paying the price for it. It is, therefore, clear that the Legislature wanted such a transaction to be regarded as a sale for the purposes of the Act. (p 463)

The learned Judges in taking this view relied upon several reported decisions of that Court. In *Dada Haji Ebrahim Helari's case*<sup>6</sup>, which was under the Madras Prevention of Food Adulteration Act (III of 1918) Ramaswami J, dissented from the view taken by Horwill, J, in *In re Bellamkonda Kanakayya*<sup>7</sup> and following the decisions in *Public Prosecutor v Narayan Singh*<sup>8</sup> and *Public Prosecutor v Ramachandrayya*<sup>9</sup> held that transaction by which a sample of an article of food was obtained by a Sanitary

1 (1972) 1 C.L.J. 132  
 2 (1961) 1 S.C.J. 481 (1961) 1 A.W.R. 633  
 3 S.C. 133 (1961) M.L.J. (Cal.) 284 (1961) 5  
 4 M.L.J. (S.C.) 133 (1961) 3 S.G.R. 324  
 5 (1961) 2 S.C.J. 571 (1961) 2 M.L.J. 381  
 6 S.C. 145 (1961) 2 A.W.R. (S.C.) 145  
 7 (1961) 3 S.G.R. 286 (1961) M.L.J. (Cal.) 649  
 8 (1961) 2 S.C.J. 666 (1961) M.L.J. (Cal.) (C.L.) 32  
 9 1 L.R. (1954) Bom 429  
 6 (1952) 2 M.L.J. 562  
 7 (1912) 2 M.L.J. 172 1 L.R. (1913) Mad  
 8 (1941) M.W.N. Cal 132  
 9 (1948) 1 M.L.J. 117 (1949) M.W.N.

Inspector from the vendor amounts to a sale even though that man was bound to give the sample on tender of the price thereof. But Mr. Anthony contends that a contract must be consensual and that this implies that both the parties to it must act voluntarily. No doubt a contract comes into existence by the acceptance of a proposal made by one person to another by that other person. That other person is not bound to accept the proposal but it may not necessarily follow that where that other person had no choice but to accept the proposal the transaction would never amount to a contract. A part from this we need not, however, consider this argument because throughout the case was argued on the footing that the transaction was a 'sale.' That was evidently because here we have a special definition of "sale" in section 2 (xii) of the Act which specifically includes within its ambit a sale for analysis. It is, therefore, difficult to appreciate the reasons which led Raman Nayar, J., to hold that a transaction like the present does not amount to a sale. We are, therefore, unable to accept that view. In the result we uphold the conviction and sentence passed on each of the appellants and dismiss these appeals.

K.S.

*Appeals dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, M. HIDAYATULLAH, J. C. SHAH AND S. M. SIKRI, JJ.

Dwarka Nath

*.. Appellant\**

*v.*

Lal Chand and others

*.. Respondents:*

*U.P. Court of Wards Act (IV of 1912), sections 37 and 53—Scope and effect—Sanction under section 37 for adoption by ward—Adoption in pursuance of—Validity of, if can be questioned in Civil Court.*

*Evidence Act (I of 1872), sections 157 and 32 (7)—Scope and applicability.*

Section 37 of the U.P. Court of Wards Act places a hurdle in the way of adoptions by the wards which must be removed before the adoption can be valid. The section affects the competence of the Wards to make the adoption and as the consent is a pre-requisite, any adoption made without such consent must be ineffective. The section however, does not make the sanction of the Court of Wards to cure illegalities or breaches of the personal law. Nor does the sanction make up for the incompetence arising under the personal law. It is obvious that if the adoption is void by reason of the personal law of the person adopting, the consent of the Court of Wards cannot cure it. Nor would the consent take the place of the essential ceremonies or the religious observances where necessary. These matters would have to be determined according to the personal law, in civil Court of competent jurisdiction.

Section 53 of the Act merely puts the exercise of discretion by officers acting under the Court of Wards Act beyond question. Thus, if the Court of Wards gave or refused its consent to a purported adoption, a suit would not lie either to cancel the consent or to compel it. The section however does not go to the length that after the consent of the Court of Wards the adoption itself cannot be questioned at all. The argument that after the consent of the Court of Wards the civil Court was incompetent to reconsider the question of the authority given by the husband cannot be accepted. .

The Court of Wards was making an enquiry for the purpose of according its consent. It was not enquiring into the fact of the giving of authority by the husband to the widow as an "authority legally competent" to decide that fact with in the meaning of section 157 of the Evidence Act. That authority is the Civil Court for the civil Court alone can finally decide such a question. It can do so even after the Court of Wards had reached a conclusion and contrary to that conclusion. Statements of witnesses before the officer acting under the Court of Wards Act are therefore not provable under section 157 of the Evidence Act. Section 32 (7) of the Evidence Act cannot be relied on either to introduce the earlier statements as they were made only after disputes had arisen and section 13 (a) will not apply. .



Appeal from the Judgment and Decree, dated the 24th March, 1959, of the Allahabad High Court in First Appeal No. 76 of 1947.

*C. B. Agarwala*, Senior Advocate (*J. P. Goyal*, Advocate, with him), for Appellant.

*S. T. Desai*, Senior Advocate (*M. V. Goyami* and *B. C. Misra*, Advocates, with him), for Respondent No. 1.

*M. V. Goyami* and *B. C. Misra*, Advocates, for Respondents Nos. 2, 7 and 8.

*R. S. Gupta*, *S. S. Khanduja* and *Ganpat Rai*, Advocates, for Respondent No. 9.

The Judgment of the Court was delivered by

*Hidayatullah, J.*—This appeal arises from a suit filed by respondents 1 and 2 for declaration of their rights to the Phulpur Estate, for possession of properties belonging to the Estate and for mesne profits. The Phulpur Estate is situated in Allahabad District. One Rai Bahadur Rai Pratap Chand who died on 23rd January, 1901, was the *Zamindar* of this Estate. After his death, his widow Rani Gomti Bibi succeeded to the Estate. Rani Gomti Bibi was considerably influenced by her brother Gaya Prasad and priests belonging to some temples. In the years following the death of her husband, Rani Gomti Bibi made many endowments involving vast properties and in July, 1920, the Court of Wards assumed charge of the Estate which the Rani was mismanaging. On 21st February, 1923, the Rani adopted one Bindeshwari Prasad and then applied to the Court of Wards under section 37 of the U. P. Court of Wards Act for permission to make the adoption. The Collector (Mr. Knox) made an enquiry and on 3rd April, 1923, made a report Exhibit 79 stating that the evidence tendered before him was so conflicting and unreliable that he had come to the conclusion that the authority of Rai Pratap Chand to adoption by his widow was not proved. He, therefore, recommended that Rani Gomti Bibi be declined permission to make the adoption and the Board of Revenue accordingly refused permission. Rani Gomti Bibi, however, executed a deed of adoption on 6th November, 1924, in favour of Bindeshwari Prasad. A suit was filed by Parmeshwar Dayal (who was the first plaintiff in the present suit) in 1925 against Rani Gomti Bibi, Bindeshwari Prasad and the Court of Wards challenging the adoption made by the Rani. On 21st August, 1926, the suit was decreed, and it was held that the adoption was contrary to section 37 of the U. P. Court of Wards Act, 1912 and was thus invalid inasmuch as permission to make the adoption was not obtained from the Court of Wards.

Rani Gomti Bibi then applied to the Court of Wards for permission to adopt Bindeshwari Prasad's brother's son Dwarka Nath who is the present appellant. Fresh enquiries about the authority of the husband were made by the then Collector Mr. Thompson. He examined witnesses from a list filed by Gaya Prasad in the earlier suit of 1925. After considering the evidence, the Collector recommended grant of permission under section 37 of the U. P. Court of Wards Act and permission was accordingly granted by the Board of Revenue. On 28th November, 1929, the Rani adopted Dwarka Nath at Phulpur. Immediately after this adoption the Court of Wards released the Estate and assumed charge of it again on behalf of Dwarka Nath who was a minor.

On 5th January, 1943, Rani Gomti Bibi died and the present suit was filed by Parmeshwar Dayal and one Amarnath Agarwal to whom Parmeshwar Dayal had assigned 6/16 share in the Estate. This suit was decreed by the Civil Judge of Allahabad who held *inter alia* that Parmeshwar Dayal was the nearest reversioner of Rai Pratap Chand and was entitled to succeed him, and further that the adoption was invalid as there was no proof of authority given by Rai Pratap Chand to Rani Gomti Bibi to make the adoption. The suit for declaration and possession was decreed with mesne profits amounting to Rs. 88,000 against Dwarka Nath and the Collector and the Court of Wards who was also made a party to the suit. Three appeals were filed against the judgment and by a common judgment dated

24th March, 1959, the High Court affirmed the decree except in respect of *mesne profits*. The High Court certified the case as fit for appeal to this Court and the present appeal results.

At the hearing, Mr. C. B. Agarwala stated on behalf of the appellant that he did not challenge that Parmeshwar Dayal was the nearest reversioner of Rai Pratap Chand. We are also not now concerned with the endowments. Mr. Agarwala contended that the findings about authority by Rai Pratap Chand to the adoption were erroneous and required to be reconsidered. In seeking reconsideration of this finding, Mr. Agarwala relied both on facts and law. In so far as his claim is to have the evidence reconsidered, it may be stated at once that it is not the practice of this Court to examine the evidence at large specially when the High Court and the Court below have drawn identical conclusion from it. In this case, the evidence about the authority, such as it was, was considered both by the Trial Judge and the High Court and they could not persuade themselves to accept it. Following the settled practice of this Court we declined to look into the evidence for the third time, but we permitted Mr. Agarwala to raise arguments of law and we shall deal with those arguments now.

Mr. Agarwala relies upon sections 37 and 53 of the U.P. Court of Wards Act, 1912 and contends that inasmuch as the Court of Wards made an enquiry into the truth of the allegations that Rai Pratap Chand had given express authority to Rani Gomti Bibi to make an adoption after death and found in favour of authority, the conclusion of the Court of Wards to grant permission and the reasons for the decision cannot be questioned by a civil suit. This argument, in our judgment, cannot be accepted. Section 37 of the U.P. Court of Wards Act in so far as it is material, reads as follows :—

“37. *Disabilities of wards*—A ward shall not be competent—

(a) .....

(b) to adopt without the consent in writing of the Court of Wards

(c) .....

Provided, first, that the Court of Wards shall not withhold its consent under clause (b)..... if the adoption..... is not contrary to the personal or special law applicable to the ward.....”

The section obviously places a hurdle in the way of adoptions by the wards which must be removed before the adoption can be valid. The section affects the competence of the wards to make the adoption and as the consent is a pre-requisite, any adoption made without such consent must be ineffective. The section, however does not make the sanction of the Court of Wards to cure illegalities or breaches of the personal law. Nor does the sanction make up for incompetence arising under the personal law. It is obvious that if the adoption is void by reason of the personal law of the person adopting, the consent of the Court of Wards cannot cure it. Nor would the consent take the place of the essential ceremonies or the religious observances where necessary. Those matters would have to be determined according to the personal law in civil Court of competent jurisdiction.

Mr. Agarwala argues that section 53 is a bar to any suit questioning the adoption made after the consent of the Court of Wards to the adoption has been given. That section cannot be used in this manner. It reads :

53 (1) The exercise of any discretion conferred on the State Government or the Court of Wards by this Act shall not be questioned in any civil Court

(2)

The section merely puts the exercise of discretion by officers acting under the Court of Wards Act beyond question. Thus, if the Court of Wards gave or refused its consent to a proposed adoption a suit would not lie either to cancel the consent or to compel it. The section, however, does not go to the length that after the consent of the Court of Wards the adoption itself cannot be questioned at all. There are no words in the section to this effect nor can such a result be implied. If the Court of Wards gave its concurrence to a proposed adoption, the bar created by section 37 of the Act would be removed, but it would not make the adoption immune from attacks in a Civil Court on any ground on which adoptions are usually questioned there. Mr Agarwala claims that the reasons for the consent of the Court of Wards are a part of the consent and are within section 53 (1). This cannot be accepted. No doubt the Court of Wards reached its own conclusion for purpose of section 37 that Rai Pratap Chand had accorded authority to Rani Gomti Bibi to adopt a son, but if the adoption was questioned in a civil Court the civil Court would not be ousted of its jurisdiction to decide the question. All that the civil Court would be compelled to hold would be that the requirements of the Court of Wards Act as to the consent of the Court of Wards were fulfilled. In our judgment, the legal argument that after the consent of the Court of Wards the civil Court was incompetent to reconsider the question of the authority given by the husband cannot be accepted.

In deciding the question of authority, the High Court rejected the oral evidence led before it and affirmed the conclusions of the trial Judge. The High Court considered this evidence both intrinsically and in the light of the attending circumstances and found it unacceptable. The trial Judge pointed out that as lawyers were present when Rai Pratap Chand is alleged to have given authority to his widow and as it was also suggested that that fact should be recorded it was unbelievable if the statements were true, that written authority would not have been prepared then and there. The High Court did not content itself with accepting the opinion of the trial Judge but discussed the evidence *de novo* and rejected it. The High Court pointed out that Rai Pratap Chand was only 30 years old at the time of his death and his wife was 25 years old and he could not have abandoned the hope of having an issue. Evidence shows that the writing was put off because it was not thought that Rai Pratap Chand was dying. The High Court also pointed out that Rani Gomti Bibi executed between 24th November, 1901 and 19th August 1904 four documents making different endowments. In none of these documents she mentioned that she had been asked by her husband to make them. The High Court pertinently pointed out that the oral evidence showed that the declaration of the authority to his wife and the oral will to make the endowments, were made by Rai Pratap Chand at the same time and these facts would have figured as the reason for the endowments in these documents. Mr Agarwala contends that even if the reasons for the endowments might be expected to be expressed, it is not logical to say that the deeds should have recited the irrelevant fact that authority was given to Rani Gomti Bibi to make the adoption. This is perhaps right, but the fact remains that the two directions of Rai Pratap Chand went hand in hand, and even if the fact of authority was not recited in the documents, one would expect at least the oral will to make the endowments to be mentioned. This shows that the whole story about oral directions to Rani Gomti Bibi was untrue.

Mr Agarwala then seeks to use the statements made by Gaya Prasad and the witnesses before Mr Thompson. In the High Court this claim was based upon sections 11, 32 and 157 of the Indian Evidence Act. The High Court rejected these statements and declined to attach any value to them. Section 11 was not relied upon before us, but the other two sections were referred to in an effort to have the evidence read. Section 157 of the Indian Evidence Act lays down

"157. *Former statements of witness may be proved to corroborate later testimony as to same fact.*—In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact may be proved."

Two circumstances, which are alternative, are conditions precedent to the proof of earlier statements under this section. The first is that the statements must have been made at or about the time when a fact took place. The fact here is the authority said to have been given by the husband in 1901. The statements were made on 18th December, 1928, 27 years after the event. They cannot be said to have been made "at or about the time when the fact took place". Further, as rightly pointed out by the High Court, the Court of Wards was making an enquiry for the purpose of according its consent. It was not enquiring into the fact of the giving of authority as an 'authority legally competent.' That authority, as we have pointed out already, is the civil Court for the civil Court alone can finally decide such a question. It can do so even after the Court of Wards had reached a conclusion, and contrary to the conclusion. Section 157 therefore cannot make the statements provable.

Mr. Agarwala next relies on section 32 (7) of the Indian Evidence Act to introduce the earlier statements. That sub-section reads :

"32. Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become, incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases :—

\*            \*            \*            \*            \*            \*            \*

\*            \*            \*            \*            \*            \*            \*

(7) When the statement is contained in any deed, will or other documents which relates to any such transaction as is mentioned in section 13, clause (a).

\*            \*            \*            \*            \*            \*            \*."

Clause (7) makes relevant statements made in deeds, wills and such other documents which relate to transactions by which a right or custom in question "was created, claimed, modified, recognised, asserted or denied" [to add the words of clause (a) of section 13]. The clause does not allow introduction of parole evidence, see Field on the Law of Evidence, 8th Edition, page 202. Such parole evidence may be relevant under clause (5) of section 32, but that is not relied upon. We questioned Mr. Agarwala whether he wished to rely upon clause (5), but he did not wish to put his case under that clause and we need not therefore consider the application of that clause. We think Mr. Agarwala is right in taking this course, because clause (5) requires that such a statement should have been made before the question in dispute was raised. The statements in question were definitely made after the question in dispute in the suit had already arisen, because one enquiry had already been made by Mr. Knox and the statements now relied upon were made in the second enquiry before Mr. Thompson.

Mr. Agarwala next wishes to use the statements made by Gaya Prasad on 14th March, 1926, "Exhibit 72"; but that clearly is not admissible, because when it was made in the suit, Gaya Prasad was being examined as a party before issues were framed. In fairness to Mr. Agarwala it may be mentioned that he did not press the point after noticing the above fact.

Mr. Agarwala contends lastly that as Dwarka Nath was adopted on 28th November, 1929, and the present suit was filed on 21st May, 1945, after more than 15 years and as during this time, Dwarka Nath had been considered by everyone to be legally and validly adopted the suit ought to have been dismissed. It may be pointed out that Parmeshwar Dayal never accepted the adoption of Dwarka Nath. He had

filed an earlier suit and questioned the competence of Rani Gomti Bibi to make the adoption of Bindeshwari Prasad. In that suit he had denied that Rai Pratap Chand had given authority to his wife to make the adoption of a son after his death. He consistently denied the validity of the second adoption and in these circumstances, it cannot be said that he was concluded by any rule of law from questioning the adoption of Dwarka Nath after Rani Gomti Bibi's death.

On an examination of all the legal pleas against the judgment of the High Court we are satisfied that none of them avails the appellant. In so far as the questions of fact are concerned we have already stated that we do not propose to go into them as it did not appear to us that there was any legal reason for reaching a different conclusion.

We accordingly dismiss the appeal but order that the parties shall bear their own costs throughout.

K S

*Appeal dismissed*

	PAGES.
Income-tax Act (XI of 1922), sections 16 (2) and 18 (5)—Dividend income—Assessee, Hindu undivided family, owner of shares— <i>Karta</i> thereof registered holder of the shares—Income assessable as that of Hindu undivided family—Dividend income—Principle of grossing up—Nothing to do with accrual of income—Accrual to the real owner .. .. .	20
Judicial Officers' Protection Act (XVIII of 1850), section 1—Protection afforded to acts done in judicial capacity only—Charge of false imprisonment made against the officer—No formal complaint lodged—No report made by any police officer in writing—No plea by the officer that the act was done in his judicial capacity—Admission that he had acted under the orders of the superior officer—Act was reckless, malicious, concurrent finding of Courts below—No protection under the Act..	1
Letters Patent (Lahore) (as amended in 1928), clauses 10 and 11—Delhi Rent Control Act (LIX of 1958), sections 39 and 43—Decision of single Judge of Punjab High Court in Second Appeal under section 39 of Delhi Rent Control Act—Appeal from to Division Bench of same High Court under clause 10 of Letters Patent—Competency—Section 43 of the Rent Control Act—Effect .. .. .	69
Madras Hindu Religious and Charitable Endowments Act (XIX of 1951), section 62 (3-a)—Application by Commissioners for modifying Scheme under which the Trustee was administering the Temple—No proof of any of the charges levelled against trustee—Appointment of an Executive Officer to be in charge of administration—Not warranted—Madras Act XXII of 1959 enacted after the suit—Plenary powers of Commissioner .. .. .	81
Motor Vehicles Act (IV of 1939), section 63 and Central Provinces and Berar Motor Vehicles Rules (1940), Rule 63—Scope and effect—Inter-regional permit—Renewal of permit but refusal of counter-signature—Effect—If Regional Transport Authority having jurisdiction over rest of route to give counter-signature .. .. .	37
Prevention of Food Adulteration Act (XXXVII of 1954), section 2 (xii)—"Sale"—Includes sale to Food Inspector for analysis— <i>Mens rea</i> —Defence of section 16 (1) (a) read with section 7 (i)—Prosecution for offences under—Certificate of Public Analyst—If sufficient to his conviction—Joint trial of wholesaler of Bombay and retail seller of Nasik—Legality—Criminal Procedure Code (V of 1898), sections 537 (b) and 182—Scope .. .. .	87
Travancore-Cochin High Courts Act (1949) (V of 1125-M.E.), sections 20 and 21—Suit valued in excess of Rs. 1,000 instituted in District Court when the Act was in operation—Provision that appeal valued in excess of Rs. 1,000 was to be heard by Bench of two Judges—Kerala High Court Act (V of 1959) coming into force during pendency of appeal—Appeal if can be heard by single Judge as provided in section 5 of Act (V of 1959). .. .. .	50
U.P. Court of Wards Act (IV of 1912), sections 37 and 53—Scope and effect—Sanction under section 37 for adoption by ward—Adoption in pursuance of—Validity of, if can be questioned in Civil Court .. .. .	95
West Bengal Service Rules, Rule 75 (a) modelled on rule 56 (a) of Fundamental Rules but having no rule corresponding to rule 56 (d) of the Fundamental Rules—Scope—Retention in service after superannuation merely for purpose of suspension and departmental enquiry—Propriety .. .. .	59

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In (1966) 1 S C J page 648 in line 19 for Nos 1 to 5 \* \* \* substitute Nos 1 to 4 for the recovery of Rs 15 370 00 said to have been advanced to them who constituted

## TABLE OF CASES IN THIS PART

### SUPREME COURT OF INDIA

	PAGES
M. A. Akbar Hasham v Union of Arab Republic	25
Anwar Hussain v Ajay Kumar Mukherjee	1
Bhaya Lal v Harikrishna Singh	77
Bhara Singh v Bhagrat	53
Bind Khani Meor Transport Co v Behari Lal Chauras	37
Dwarka Nath v Lal Chand	95
P. C. Gula v Laxmi Ram	42
Kamal Narayan Sarma v Dwarka Prasad Mishra	34
Kisharchand Lunidarsing Bajaj v C.I.T. Bangalore	20
Mohammed Meera Lebba v Trimalaya Gounder	50
Morvi Mercantile Bank Ltd v Union of India	6
S. D. G. Pandarasannadhu v State of Madras	81
M. R. Ruparel v State of Maharashtra	87
Southern Airways Industries (P) Ltd v Sarup Singh	69
State of West Bengal v Anandram Nath Bagchi	59

## INDEX OF REPORTS

Civil Procedure Code (V of 1908) section 86 (1)—Applicable—Suit against foreign State which republishes form of Government—Consent of Central Government—Essential—Internal Law—Foreign State—Immunity from being sued in Municipal Courts	25
Conduct of Election Rules (1961) rule 94-A—Scope—Affidavit in support of election petition on sworn before District Court—Chief of Court appointed under section 139 (1) Code of Civil Procedure (V of 1908)—If sufficient compliance with rule 94 A	34
Constitution of India (1950) Article 235—District Judge—Is subject to "control" of the High Court—Control—Includes disciplinary functions	39
Constitution of India (1950) Article 341 (1)—Caste (Scheduled Caste) Order 1950 issued by President under Article 341 (1)—Public place on regarding scheduled caste—Facts that Dehar caste is a sub-caste of Chamars caste—If can be entertained	77
Contract Act (IX of 1872) as amended by Indian Contract (Amendment) Act (1930) sections 172, 178 and 180—Pledge of goods covered by document of title in such as a railway receipt—If could be validly made by owner by transfer of the documents of title representing the goods—Endorsement of railway receipt as security for advances made to the owner of goods—If operates as a pledge of the goods covered by the railway receipt—Right of such endorsee to sue the railway for non-delivery of goods—Measure of damages	6
Criminal Procedure Code (V of 1908) section 525 (1) (b)—Scope—High Court competent to transfer case pending before a Magistrate for trial to a Court of Sessions Judge	42
Evidence Act (I of 1872) sections 13 and 32 (7)—Scope and applicability	95
Hindu Law—Joint family—Hindu brothers—Presumption of joint family—Severance—Onus of proof—Evidence Act (I of 1872) sections 21—Admission—Admission liability in evidence—Failure to consent under section 145 maker of such statement in witness-box—Effect	53

(Continued at cover page 3)

# THE SUPREME COURT JOURNAL

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## CONTENTS

	PAGES.
Reports	101—264

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# CUMULATIVE TABLE OF CASES REPORTED.

## PARTS 1-2

	PAGES
Ajoy Kumar Mukherjee v. Local Board of Barpeta. ..	153
M. A. Akbar Kashani v. United Arab Republic ..	25
Anowar Hussain v. Ajoy Kumar Mukherjee ..	1
S. Banerjee v. S. Agarwala ..	111
Bhaiya Lal v. Harikishan Singh ..	77
Bharat Singh v. Bhagirathi ..	53
Biram Prakash v. Narendra Dass ..	220
Brundaban Nayak v. Election Commission of India ..	166
Bundelkhand Motor Transp. Co. v. Behari Lal Chaurasia ..	37
Gochin State Power & Light Corpn. v. State of Kerala ..	204
Dwarka Nath v. Lal Chand ..	95
General Assurance Society Ltd. v. Chandumull Jain ..	101
P. C. Gulati v. Lajya Ram ..	42
Gurbinder Singh v. Lal Singh ..	157
Gurcharan Das Chadha v. State of Rajasthan ..	139
Harinagar Sugar Mills Co. v. M. W. Pradhan ..	126
N. S. Z. Hossain Mirza v. Satyendra Nath Bose ..	208
Kaluram Onkarmal v. Baidyanath Gorain ..	145
Kamal Narain Sarma v. Dwarka Prasad Mishra ..	34
Kishanchand Lunidasing Bajaj v. C.I.T., Bangalore ..	20
Laliteshwar Prasad v. Bateshwar Prasad ..	241
Mohammed Meera Lebbai v. Tirumalaya Gounder ..	50
Morvi Mercantile Bank Ltd. v. Union of India ..	6
Nand Kishore Saraf v. State of Rajasthan ..	194
S. D. G. Pandarasannadhi v. State of Madras ..	81
Raja Gopala Rao v. Sitharamamma ..	179
Ratanlal v. State of Maharashtra ..	133
M. R. Ruparel v. State of Maharashtra ..	87
Sahoo v. State of U.P. ..	172
Sales Tax Officer v. M/s. Shiv Ratta G. Mohatta..	161
South Asia Industries (P.), Ltd. v. Sarup Singh ..	69
State of Bombay v. Nurul Latif Khan ..	184
State of Madras v. Govindarajulu Naidu ..	213
State of Madras v. Kunnakudi Melamatam ..	175
State of M.P. v. V. P. Sharma ..	231
State of U.P. v. R. Sharma Vaidya ..	200
State of U.P. v. Srinarayan ..	190
State of W.B. v. Nripendra Nath Bagchi ..	59
K. H. Thacker v. M/s. The Saran Engineering Co., Ltd. ..	196
Union of India v. Sukumar Pyne ..	227
Vaithilingam Pillai Charities v. Vijayavalli Achi ..	259

# CUMULATIVE INDEX OF REPORTS.

## PARTS 1-2

	PAGES
Assam Local Self Government Act (XXV of 1933), section 62—Levy of Annual tax by Local Boards for use of any land for the purpose of holding markets—Constitutionality—Constitution of India (1950) Article 14—If isolated	103
Bihar Land Reforms Act (XXX of 1950), section 14—Claim by mortgagee—Limitation—Considerations	208
Bombay Prohibition Act (XXV of 1949) sections 6-A (as amended by Act XXII of 1960) 24 A and 59 A—Medicinal preparations ( <i>Mahadrajshasara and Dast</i> <i>sholarshia</i> alcohol content above 50 per cent. by volume—Manufacture by distillation process by a licensed person and issue from a bonded warehouse—Possession (on 14th September, 1960) if offends the statute—Exemption under section 24 A (2)—Applicability—Subsequent declaration (on 4th October, 1960) under section 6-A if effective	133
Civil Procedure Code (V of 1908) sect on 11— <i>Res judicata</i> —Deed of partition between adoptive father and adopted son—Allotment of properties to adopted son and retention of some lands by adoptive father and mother for life—Vested interest to adopted son—Death of adoptive father—Suit against adoptive mother by adopted son claiming possession of entire properties—Defence of right to possession of entire properties by mother—Decision that half the properties to go to adopted son and half to be retained by mother for life—Stray sentence in the judgment that half share of mother on her death would go to her representatives—If would constitute <i>res judicata</i> —Suit for possession by purchaser of the vested interest of the adopted son for the half share held by the adoptive mother—Decision on a point not necessary for the purpose of the prior suit—Not to constitute <i>res judicata</i>	209
Civil Procedure Code (V of 1908) section 86 (1)—Applicability—Suit against foreign State with republican form of Government—Consent of Central Government—Essential—International Law—Foreign State—Immunity from being sued in Municipal Courts	125
Companies Act (I of 1936) sections 433 (c) 434 (1) (a) and 439 (1) (b)—Civil Procedure Code (V of 1908) Order 40 Rule 1—Petition for winding up of a company—Company indebted to a joint Hindu family—Receiver appointed by Court in a suit for partition of the properties of the joint family—Empowered to take necessary proceedings to realise the properties and debts due to the family—If can file a petition for winding up—Statutory notice to pay the debt to Assistant Collector Bombay in discharge of income tax due by the family—If proper and sufficient—Non-compliance amounts to neglect to pay the debt—Petition maintainable—Income tax Act (XI of 1927) section 45	126
Conduct of Election Rules (1961) rule 94 A—Scope—Affidavit in support of election petition sworn before District Court-Clerk of Court appointed under section 139 (c), Code of Civil Procedure (V of 1908)—If sufficient compliance with rule 94 A	34
Constitution of India (1950) Articles 133 and 136—Representation of the People Act (XLIII of 1951) section 116-B—Jurisdiction conferred by Articles 133 and 136—Cannot be restricted by section 116-B	211
Constitution of India (1950) Article 226—Period of impugned contract coming to end after a very short time from date of order—Writ will not be issued to cancel order of Government granting the contract	191
Constitution of India (1950) Article 226—Scope and object—Sales tax assessment—Remedy available under the Sales Tax Act—Petition under Article 226—Not to be entertained—Nature of order that can be made under Article 226	161
Constitution of India (1950), Article 235—District Judge—Is subject to "control" of High Court—Control—Includes disciplinary jurisdiction	59
Constitution of India (1950) Article 311—Right of charge-sheeted officer to be given opportunity to lead oral evidence if he desires—Enquiry officer if can say that having regard to the charges he would not hold an oral enquiry—Civil Services (Classification, Control and Appeal) Rules Rule 53—Scope	181
Constitution of India (1950) Article 341 (1)—Constitution (Scheduled Castes) Order, 1950 issued by President under Article 341 (1)—Publication regarding scheduled castes—Plea that Debar caste is a sub-caste of Chamar caste—If can be entertained	77
Comptroller of Court—Trial of a member of All India Services before the Special Judge—Pending petition in Supreme Court for transfer—Departmental proceeding for transgression of (Conduct) Rules prohibiting disclosure of official documents and	

	PAGES.
information—Charge of disclosure to his advocates of the member in regard to writ proceeding in High Court—Likely to amount to obstruction of administration of justice and putting person under duress—Contempt—Action of State deprecated..	139
Contract Act (IX of 1872), section 73—Illustration, (1)—Contract by X for sale of iron scraps to Y—Y entering into similar contract with third party for export—Breach by X of original contract—Y unable to supply third party who purchased from open market and recovered the difference in price from Y—Y when entitled to recover the amount as damages from X ..	196
Contract Act (IX of 1872), as amended by Indian Contract (Amendment) Act (1930), sections 172, 178 and 180—Pledge of goods covered by documents of title such as a railway receipt—If could be validly made by owner by transfer of the documents of title representing the goods—Endorsement of railway receipt as security for advances made to the owner of goods—If operates as a pledge of the goods covered by the railway receipt—Right of such endorsee to sue the railway for non-delivery of goods—Measure of damages ..	6
Contract of Insurance—Essentials—Condition in policy giving power for cancellation at will—Mutual—Binding on parties—Power of cancellation to be exercised before commencement of risk ..	101
Criminal Procedure Code (V of 1898), section 526 (1) (ii)—Scope—High Court if competent to transfer case, pending before a Magistrate for trial to a Court of Sessions, Judge ..	42
Criminal Procedure Code (V of 1898), section 527 and Criminal Law Amendment Act (XLVI of 1952), sections 6, 7 and 8—Case pending before the Special Judge under the Act of 1952—Petition in Supreme Court for transfer to Court of equal jurisdiction under High Court of another State—Jurisdiction—No inconsistency between section 527 of Code and section 7 (2) of Act of 1952—Transfer of case—Ground of reasonable apprehension of denial of justice, essential—General feeling of hostility of persons, in sufficient—Likely interference with course of justice to be made out—Practice—Question of inherent jurisdiction—To be tried first before dealing on merits ..	139
Election Commission—Powers—Desirability of legislation vesting powers pointed out ..	166
Electricity Act (IX of 1910) (as amended by Act XXXII of 1959), section 6—Scope—Electricity Board for the state exercising option to purchase the undertaking but notice to licensee not being in accordance with law—Effect—State Government if vested with the option under section 6 (2) of the amended Act ..	204
Evidence Act (I of 1872), sections 24 to 30—Confession—Confessional soliloquy—If direct piece of evidence—Weight to be attached to such evidence ..	172
Evidence Act, (I of 1872), sections 157 and 32, (7)—Scope and applicability ..	95
Foreign Exchange Regulation Act (VII of 1947) as amended by Act (XXXIX of 1957), sections 23 (1) (a) and 23-D—Contravention of section 23 (1) committed before the amended Act (XXXIX of 1957) came into force—Adjudication proceedings under the amended provisions—Legality—Amended section 23 (1) (a) if contravenes Article 20 (1) of the Constitution of India (1950)...	227
Hindu Law—Brahmin woman whose husband was alive becoming concubine of sudra and having children by him— <i>Avaruddha Stree</i> entitled to maintenance out of paramours estate for herself and her children—Right to maintenance if destroyed by Hindu Adoptions and Maintenance Act (LXXVIII of 1956) coming into force during pendency of appeal against decree giving maintenance ..	179
Hindu Law—Joint family—Hindu brothers—Presumption of joint family—Severance—Onus of proof—Evidence Act (I of 1872); section 21—Admissions—Admissibility in evidence—Failure to confront under section 145 maker of such statement in witness-box—Effect ..	53
Income-tax Act (XI of 1922), sections 16 (2) and 18 (5)—Dividend income—Assessee, Hindu undivided family, owner of shares— <i>Karta</i> thereof registered holder of the shares—Income assessable as that of Hindu undivided family—Dividend income—Principle of grossing up—Nothing to do with accrual of income—Accrual to the real owner ..	20
Insurance—Proposals, letters of acceptance, cover-notes and policies, nature and interpretation of—Cover-notes if to accompany letters of acceptance—Reference therein to conditions in policies—If effective ..	101
Iron and Steel (Control) Order (1956) clause 7—Construction—“Use”—If includes “non-use”—Conditions of permit—Application for permit if can be looked into to find out ..	200
Judicial Officers' Protection Act (XVIII of 1850), section 1—Protection afforded to acts done in judicial capacity only—Charge of false imprisonment made against the officer—No formal complaint lodged—No report made by any police officer in	

writing—No plea by the officer that the act was done in his judicial capacity—Admission that he had acted under the orders of the superior officer—Act was reckless malicious concurrent finding of Courts below—No protection under the Act	1
Land Acquisition Act (I of 1894) sections 4 5 and 6—Number of declarations under section 6—If can be served successively in respect of different pieces of lands within the locality specified in a notification under section 4 of the Act	231
Letters Patent (Lahore) (as amended in 1928) clauses 10 and 11—Delhi Rent Control Act (LIX of 1908) sections 39 and 43—Decision of single Judge of Punjab High Court in Second Appeal under section 39 of Delhi Rent Control Act—Appeal from to Division Bench of same High Court under clause 10 of Letters Patent—Competency—Section 43 of the Rent Control Act—Effect	69
Lumination Act (IX of 1908) section 2 (4) Art des 142 and 144—Article 142 when attracted—Suit governed by Article 144—Computation of period of lumination—Tacking of adverse possession of independent trespasser—Permissibility	157
Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948) sections 2 (15) (16) and 3—Madras Estates Land Act (I of 1908) section 3 (2) (c)—Mothurambedu village in Madras State—If zamindari estate or under tenure estate—Notification under section 3 of Act XXVI of 1948 taking over the said estate as zamindari estate—Validity	213
Madras Hindu Religious and Charitable Endowments Act (XIX of 1951) section 62 (3-a)—Application by Commissioners for modifying Scheme under which the Trustee was administering the Temple—No proof of any of the charges levelled against trustee—Appointment of an Executive Officer to be in charge of administration—Not warranted—Madras Act XXII of 1909 enacted after the suit—Plenary powers of Commissioner	81
Madras Hindu Religious and Charitable Endowments Act (XIX of 1951) sections 62, 93 103 (i)—Institution held to be not a Math under the Madras Act II of 1927—Finality of the decision—Claim for contribution and a dit fees on the basis that it was a Math—Not sustainable under Madras Act II of 1927—Injunction to restrain levy of contribution under Act XIX of 1951—Question cannot be entertained in a suit not instituted under section 62 of the Act of 1951—Section 103 (i) of Act of 1951—No continuance of levy was alleged under the Act of 1927—Estoppel—Institution is one outside the Act of 1927—Act of Head of institution—Not to affect the position of the Institution	175
Math—Expenses of suit by the rightful claimant to Gaddi—Binding on the Math and its properties—Mortgage by the Nachadhipati to secure payment of such debts—Alienation of properties to mortgage a part of the property sold under the sale in execution of the mortgage decree—Legal necessity—Test of	220
Motor Vehicles Act (IV of 1939) section 63 and Central Provinces and Berar Motor Vehicles Rules (1940) Rule 63—Scope and effect—Inter regional permit—Renewal of permit but refusal of counter signature—Effect—If Regional Transport Authority having jurisdiction over rest of route to give counter-signature	37
Prevention of Food Adulteration Act (XXXVII of 1954) section 2 (xii)—"Sale"—Includes sale to Food Inspector for analysis— <i>Mens rea</i> —Defence of section 16 (1) (a) read with section 7 (a)—Prosecution for offences under—Certificate of Public Analyst—If sufficient to his conviction—Joint trial of wholesaler of Bombay and retail seller of Nasik—Legality—Criminal Procedure Code (V of 1873), sections 537 (b) and 182—Scope	87
Rajasthan Minor Mineral Concessions Rules Rule 36—Auction for grant of royalty collection contract—Government if bound to accept highest bid and confirm contract—Discretion of Government to relax the Rules—Rule 59	194
Representation of the People Act (XLIII of 1951) (as amended by Act LVIII of 1958) section 7 (4)—Scope—Effect of amendment made in 1958—Section as amended if embraces only executory contracts—Contract in contravention of Article 299 of the Constitution of India (1950) and in fact not ratified—If falls within the ambit of section 7 (4)	241
Representation of the People Act (XLIII of 1951) section 19 (2)—Construction and scope—Question of disqualification—How can be raised	166
Sea Customs Act (VIII of 1878) section 167 (81)—Importing of goods against restrictions under the Act—Smuggled goods ran rge out of the hands of the actual smuggler—In possession of persons unconnected with actual import—Liability for confiscation—"Concerned" in dealing with prohibited goods—Question depends on facts of each case—Dealing in prohibited goods under a prior arrangement—Accused apprehended in the attempt—Whether concerned	111
Travancore-Cochin High Courts Act (1919) (V of 1125-M E.) sections 20 and 21—Suit valued in excess of Rs. 1,000 instituted in District Court when the Act was in operation—Provision that appeal valued in excess of Rs. 1,000 was to be heard by Bench	

of two Judges—Kerala High Court Act (V of 1959) coming into force during pendency of appeal—Appeal if can be heard by single Judge as provided in section 5 of Act (V of 1959).

50

U.P. Court of Wards Act (IV of 1912), sections 37 and 53—Scope and effect—Sanction under section 37 for adoption by ward—Adoption in pursuance of—Validity of, if can be questioned in Civil Court

95

U.P. Zamindari Abolition and Land Reforms Act (I of 1951), section 6 (d) and rule 8-A of the Rules—Compensation bonds issued by the State Government to the intermediaries—If should be accepted in payment of agricultural income-tax due from them

190

West Bengal Premises Tenancy Act (XII of 1956), sections 17 and 22—Deposit before Controller under section 22 after filing of suit—If sufficient to bar applicability of section 17 (3)

145

West Bengal Service Rules, Rule 75 (a) modelled on rule 56 (a) of Fundamental Rules but having no rule corresponding to rule 56 (d) of the Fundamental Rules—Scope—Retention in service after superannuation merely for purpose of suspension and departmental enquiry—Propriety

59

Words and Phrases—*‘In any way concerned’*—*‘In any manner dealing with prohibited goods’*—*‘Concerned in’*—*‘Deal with’*

111

Words and Phrases—*“Use”*—If includes non-use

200

# TABLE OF CASES IN THIS PART

## SUPREME COURT OF INDIA

	PAGES
Ajoy Kumar Mukherjee v Local Board of Barpeta	153
S Banerjee v S Agarwala	111
Bram Prakash v Narendra Dass	220
Brundaban Nayak v Election Commission of India	166
Cochin State Power & Light Corpn. v State of Kerala	204
General Assurance Society Ltd v Chandumull Jain	101
Gurbinder Singh v Lal Singh	157
Gurcharan Das Chadha v State of Rajasthan	139
Harinagar Sugar Mills Co v M W Pradhani	126
N S Z Hossain Mirza v Satyendra Nath Bose	200
Kaluram Onkarmal v Baidyanath Gora	145
Laliteshwar Prasad v Bakeshwar Prasad	241
Nand Kishore Saraf v State of Rajasthan	194
Raja Gopala Rao v S Karamamma	179
Ratanlal v State of Maharashtra	133
Sahoo v State of U P	172
Sales Tax Officer v M/s Shiv Ratta G Mohata	161
State of Bombay v Nurul Latif Khan	184
State of M P v V P Sharma	231
State of Madras v Govindarajulu Naidu	213
State of Madras v Kurnakudi Melamattam	175
State of U P v R. Sharma Vaidya	200
State of U P v Srinarayan	190
K. H. Thacker v M/s. The Saran Engineering Co Ltd	196
Union of India v Sukumar Pyne	227
Vaidhyanathan Pillai Chari v Vijaya Valli Achi	259

## INDEX OF REPORTS

Assam Local Self Government Act (XXXV of 1953) sect on 60—Levy of Annual tax by Local Boards for use of any land for the purpose of holding markets—Constitutionality—Constitution of India (1950) Article 14—If voided	153
Bihar Land Reforms Act (XXX of 1950) sect on 14—Claim by mortgagee—Limitation—Considerations	200
Bombay Prohibition Act (XXV of 1949) sect on 6-A (as amended by Act XXII of 1950) 21-A and 59-A—Medicinal preparations (Mahabharatshikara and Dabholani) alcohol content above 50 per cent by volume—Manufacture by State in process by a licensed person and issue from a bonded warehouse—Power to issue (14th September 1950) if offends the statute—Exception under sec 74 A (2)—Appellate—Subsequent declaration (14th October 1951) in relation 6-A if effective	131
Civil Procedure Code (V of 1908) sect on 11—Resort to—Death of parties between adoptive father and adopted son—Allotment of property to adopted son and retention of some lands by adoptive father and mother for life—Vested interest to adopted son—Death of adoptive father—Survival of adoptive mother by adopted son causing possession of entire property—Defence of right to possession of entire properties by mother—Decision that half the properties to go to adopted son and half to be retained by mother for life—Stay sentence in the judgment that half share of mother on her death would go to her representatives	

—If would constitute <i>res judicata</i> —Suit for possession by purchaser of the vested interest of the adopted son for the half-share held by the adoptive mother—Decision on a point not necessary for the purpose of the prior suit—Not to constitute <i>res judicata</i> .. .. .	259
Companies Act (I of 1956), sections 433 (e), 434 (1) (a) and 439 (1) (b)—Civil Procedure Code (V of 1908), Order 40, Rule 1—Petition for winding up of a company—Company indebted to a joint Hindu family—Receiver appointed by Court in a suit for partition of the properties of the joint family—Empowered to take necessary proceedings to realise the properties and debts due to the family—If can file a petition for winding up—Statutory notice to pay the debt to Assistant Collector, Bombay, in discharge of income-tax due by the family—If proper and sufficient—Non-compliance amounts to 'neglect to pay' the debt—Petition maintainable—Income-tax Act (XI of 1922), section 46 .. .. .	126
Constitution of India (1950), Articles 133 and 136—Representation of the People Act (XLIII of 1951), section 116-B—Jurisdiction conferred by Articles 133 and 136—Cannot be restricted by section 116-B .. .. .	241
Constitution of India (1950), Article 226—Period of impugned contract coming to end after a very short time from date of order—Writ will not be issued to cancel order of Government granting the contract .. .. .	194
Constitution of India (1950), Article 226—Scope and object—Sales tax assessment—Remedy available under the Sales Tax Act—Petition under Article 226—Not to be entertained—Nature of order that can be made under Article 226 .. .. .	161
Constitution of India (1950), Article 311—Right of charge-sheeted officer to be given opportunity to lead oral evidence if he desires—Enquiry officer if can say that having regard to the charges he would not hold an oral enquiry—Civil Services (Classification, Control and Appeal) Rules, rule 55—Scope .. .. .	184
Contempt of Court—Trial of a member of All India Services before the Special Judge—Pending petition in Supreme Court for transfer—Departmental proceedings for contravention of (Conduct) Rules prohibiting disclosure of official documents and information—Charge of disclosure to his advocates of the member in regard to writ proceedings in High Court—Likely to amount to obstruction of administration of justice and putting person under duress—Contempt—Action of State deprecated .. .. .	139
Contract Act (IX of 1872), section 73—Illustration (k)—Contract by X for sale of iron scraps to Y—Y entering into similar contract with third party for export—Breach by X of original contract—Y unable to supply third party who purchased from open market and recovered the difference in price from Y—Y when entitled to recover the amount as damages from X .. .. .	196
Contract of Insurance—Essentials—Condition in policy giving power for cancellation at will—Mutual—Binding on parties—Power of cancellation to be exercised before commencement of risk .. .. .	101
Criminal Procedure Code (V of 1898), section 527 and Criminal Law Amendment Act (XLVI of 1952), sections 6, 7 and 8—Case pending before the Special Judge under the Act of 1952—Petition in Supreme Court for transfer to Court of equal jurisdiction under High Court of another State—Jurisdiction—No inconsistency between section 527 of Code and section 7 (2) of Act of 1952—Transfer of case—Ground of reasonable apprehension of denial of justice, essential—General feeling of hostility of persons, insufficient—Likely interference with course of justice to be made out—Practice—Question of inherent jurisdiction—To be tried first before dealing on merits .. .. .	139
Election Commission—Powers—Desirability of legislation vesting powers pointed out .. .. .	166
Electricity Act (IX of 1910) (as amended by Act XXXII of 1959), section 6—Scope—Electricity Board for the state exercising option to purchase the undertaking but notice to licensee not being in accordance with law—Effect—State Government if vested with the option under section 6 (2) of the amended Act .. .. .	204
Evidence Act (I of 1872), sections 24 to 30—Confession—Confessional soliloquy—If direct piece of evidence—Weight to be attached to such evidence .. .. .	172
Foreign Exchange Regulation Act (VII of 1947) as amended by Act (XXXIX of 1957), sections 23 (1) (a) and 23-D—Contravention of section 23 (1) committed before the amended Act (XXXIX of 1957) came into force—Adjudication proceedings under the amended provisions—Legality—Amended section 23 (1) (a) if contravenes Article 20 (1) of the Constitution of India (1950) .. .. .	227
Hindu Law—Brahmin woman whose husband was alive becoming concubine of sudra and having children by him— <i>Avaruddha Stree</i> entitled to maintenance out of paramours estate for herself and her children—Right to maintenance if destroyed by Hindu Adoptions and Maintenance Act (LXXVIII of 1956) coming into force during pendency of appeal against decree giving maintenance .. .. .	179
Insurance—Proposals, letters of acceptance, cover-notes and policies, nature and interpretation of—Cover-notes if to accompany letters of acceptance—Reference therein to conditions in policies—If effective .. .. .	101



	PAGES.
Iron and Steel (Control) Order (1956) clause 7—Construction— Use —If includes non use' —Conditions of permit—Application for permit if can be looked into to find out .. ..	200
Land Acquisition Act (1 of 1894) sections 4, 5 and 6—Number of declarations under section 6—If can be issued successively in respect of different pieces of lands within the locality specified in a notification under section 4 of the Act .. ..	231
Limitation Act (IX of 1908) section 2 (4) Articles 142 and 144—Article 142 when attracted—Suit governed by Article 144—Computation of period of limitation—Tacking of adverse possession of independent trespassers—Immutability .. ..	157
Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948) sections 2 (15), (16) and 3—Madras Estates Land Act (1 of 1908) section 3 (2) (e)—Mothira rambodu village in Madras State—If zamun estate or under tenure estate—Notification under section 3 of Act XXVI of 1948 taking over the said estate as zamun estate—Validity .. ..	213
Madras Hindu Religious and Charitable Endowments Act (XIX of 1951), sections 62, 93 103 (1)—Institution held to be not a Math under the Madras Act II of 1927—Finality of the decision—Claim for contribution and audit fees on the basis that it was a Math—Not sustainable under Madras Act II of 1927—Injunction to restrain levy of contribution under Act XIX of 1951—Question cannot be entertained in a suit not instituted under section 62 of the Act of 1951—Section 103 (1) of Act of 1951—No continuance of levy was alleged under the Act of 1927 —Estoppel—Institution is one outside the Act of 1927—Act of Head of institution—Not to affect the position of the Institution .. ..	175
Math—Expenses of suit by the rightful claimant to Gaddi—Binding on the Math and its properties—Mortgage by the Mathadhipati to secure payment of such debts—Alienation of properties to salvage a part of the property sold under the sale in execution of the mortgage decree—Legal necessity—Test of .. ..	220
Rajasthan Minor Mineral Concession Rules Rule 36—Auction for grant of royalty collection contract—Government is bound to accept highest bid and confirm contract—Discretion of Government to relax the Rules—Rule 59 .. ..	194
Representation of the People Act (XLIII of 1951) (as amended by Act LVIII of 1958), section 7 (d)—Scope—Effect of amendment made in 1958—Section as amended if embraces only executory contracts—Contract in contravention of Article 299 of the Constitution of India (1950) and in fact not ratified—If falls within the ambit of section 7 (d) .. ..	241
Representation of the People Act (XLIII of 1951), section 192 (2)—Construction and scope—Question of disqualification—How can be raised .. ..	166
Sea Customs Act (V III of 1878) section 167 (81)—Importing of goods against restrictions under the Act—Smuggled goods passing out of the hands of the actual smuggler —In possession of persons unconnected with actual import—Liability for confiscation—Concerned in dealing with prohibited goods—Question depends on facts of each case—Dealing in prohibited goods under a prior arrangement—Accused apprehended in the attempt—Whether 'concerned' .. ..	111
U P Zamindari Abolition and Land Reforms Act (1 of 1951) section 6 (d) and rule D-A of the Rules—Compensation bonds issued by the State Government to the intermediaries—If should be accepted in payment of agricultural income-tax due from them .. ..	190
West Bengal Premises Tenancy Act (XII of 1956), sections 17 and 22—Deposit before Controller under section 22 after filing of suit—If sufficient to bar applicability of section 17 (3) .. ..	145
Words and Phrases—' Use —If includes non-use .. ..	200
Words and Phrases—' In any way concerned'—' In any manner dealing with prohibited goods' —' Concerned is'—' Deal with' .. ..	111

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction)

PRESENT—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, M. HIDAYATULLAH, V. RAMASWAMI AND P. SATYANARAYANA RAJU, JJ.

The General Assurance Society Ltd.

.. Appellants\*

v.

Chandmull Jain and another

.. Respondents.

*Insurance—Proposals, letters of acceptance, cover-notes and policies, nature and interpretation of—Cover-notes if to accompany letters of acceptance—Reference therein to conditions in policies—If effective.**Contract of Insurance—Essentials—Condition in policy giving power for cancellation at will—Mutual—Binding on parties—Power of cancellation to be exercised before commencement of risk.*

The respondents submitted proposals to the appellants with a view to insuring certain houses in Dhulian for Rs. 51,000 and Rs. 65,000 in respect of 2 holdings against fire, and including loss or damage by cyclone, flood and/or change of course of the river Ganges, erosion, landslide and subsidence. They were accepted by 2 letters dated 3rd June, 1950, which stated that, in accordance with the proposals the assured was held covered under cover-notes enclosed therewith. There is a dispute whether they were so enclosed. It appears from the copies of the interim cover-notes filed at the trial by the appellants that they bear the date 5th June, 1950. The copies filed contain a clause that the insurance against damages was for one year and subject to the terms, of the proposal and to the usual conditions of the policies of the appellant society and limited to a period of 30 days or the dates of issue of policies or if the risk be declined by the notification of such declaration.

Premia were paid on 7th June, but as no policies were received the respondents wrote a letter on 1st July asking for the policies or for extending the cover-notes. It was not done.

On 6th July the appellants sent letters cancelling the risk. The respondents wrote back that they could not do so as erosion had already commenced. The appellants pointed to Condition 10 of the Fire Policy of the company and asserted their right to so terminate at the option of the Society which the respondent countered by saying that it applied only to a fire risk and not to others.

The houses were washed away on 13th and 15th August. The suit filed by the respondents was dismissed but was decreed in appeal to the extent of Rs. 1,10,000. The High Court certified the case as fit for appeal and on appeal to the Supreme Court by the Society.

*Held*, documents like the proposal, cover-note and the policy are commercial documents and to interpret them commercial habits and practices cannot be ignored. A cover-note is a temporary and limited agreement. It may be self-contained or it may incorporate the terms and conditions of the future policy in which case it may merely refer to a standard policy.

During the time the cover-note operates the relations of the parties are governed by its terms and conditions or more usually by the terms and conditions of the policy bargained for and to be issued. Even when there is delay in issuing the policy the relations will be governed by the future policy if the cover-note gives sufficient indication that it would be so.

The essentials of a contract of insurance are (i) the definition of the risk ; (ii) the duration of the risk ; (iii) the amount of premium ; and (iv) the amount of damages. The policy besides containing these essentials usually lays down and ensures the rights of parties and the obligations of each side are also defined.

Even if the letter of acceptance of the proposal went beyond the cover-note in the matter of duration, the terms and conditions of the proposed policy would govern the case, for where contract of insurance is complete it is immaterial when the policy is actually delivered ; the rights of parties are governed by the policy to be, between the acceptance and delivery of policy. Even if no terms are specified in the letter of acceptance or the cover-note the terms contained in a policy ordinarily issued would apply.

The cover-notes might be sent later without impairing the effect of the reference to them in the letters of acceptance.

In interpreting documents relating to contract of insurance the duty of a Court is to interpret the words in which the contract is expressed by the parties ; it is not for the Court to make a new contract however reasonable it may be.

In the instant case the proposals, the letters of acceptance and the copies of the cover notes (filed with the written statement) make it clear that a contract of insurance under the standard policy of fire and extended to cover flood etc., has come into being. The letters of acceptance expressly mention the cover-notes and the cover notes expressly mention that it was subject to the usual conditions of the policy thus Condition 10 of the fire policies applied.

The argument that that condition could not operate between the parties till the policies were signed and delivered—it never happened in this case—cannot be accepted. Further the assured cannot sustain the suit except by basing it on the policy and in the plaint the policy was, in fact, invoked.

Condition 10 gives mutual rights to the parties to cancel the same, it is sound in principle and is not an unusual term. Cancellation is reasonably possible before the liability under the policy has commenced or has become inevitable and it is a question of fact in each case whether it is legitimate or otherwise.

On facts there is no evidence to establish that at the time of cancellation the insured houses were in such danger and the loss had commenced or become inevitable.

The rights of the plaintiffs to the policy and to enforce it is lost by the cancellation made by the insurer.

*Sun Fire Office v Hart and others* (1889) L.R. 14 A.C. 98 and *The Central Bank of India v Hartford Fire Insurance Co Ltd* (1963) 1 Comp L.J. 226 (1965) 1 S.C.J. 498, relied on.

Appeal from the Judgment and Decree dated the 13th/14th July, 1961, of the Calcutta High Court in Appeal No. 44 of 1959.

G B Agarwala, Senior Advocate (B M Agarwala and S N Shroff, Advocates with him), for Appellants.

Niren De, Additional solicitor of India (G L Sanghi and Nirmal Kumar Ghoshal, Advocates and J B Dadachani, O C, Mathur and Ravinder Narain, Advocates of M/s J B Dadachani & Co, with him), for Respondents.

The Judgment of the Court was delivered by

**Hidayatullah, J**—This appeal is taken from a judgment of the High Court of Calcutta, 13th and 14th July, 1961, by which a Division Bench of the High Court reversing the judgment of a learned single Judge of the same Court, decreed the respondents' claim for damages. The circumstances were these. The appellant is a general insurance company. On 2nd June, 1950, the respondents submitted proposals to the Company with a view to insuring certain houses in Dhulian bearing Holding Nos. 274, 274/A B C and D and 273, 273/A B-C and D for Rs. 51,000 and Rs. 65,000 respectively against fire and including loss or damage by cyclone, flood and/or change of course of river or erosion of river, landslides and subsidence. The town of Dhulian is situated on the banks of the Ganges and for several years the river had been changing its course and in 1949 a part of the town was washed away. The insurance was obviously effected with this risk in sight. The period of insurance was to be from 3rd June, 1950 to 2nd June, 1951. The Company accepted the proposals by two letters (Ex. D) on 3rd June, 1950 and the letters stated that in accordance with the proposal the assured was held covered under cover notes enclosed with the letters. At the back of these letters of acceptance, there was description of the houses and an endorsement which read—

"Including cyclone flood and/or loss by change of course of river deluvium and/or erosion of River, landslide and/or subsidence. It is further noted that there is a thatched building of insurance within 50 ft. of the above premises."

Two interim protection cover notes Nos. 18843 and 18850 in respect of the two proposals were filed by the Insurance Company along with the written statement and they were said to be copies of cover notes sent with the letters of acceptance, but they bore the date 5th June, 1950. There is some dispute as to whether they were at all enclosed with the reply showing acceptance of the proposals. Of the two cover notes which are identical except for details we may read one only—

"Messrs. Chandmull Lal Chand P O Dhulian Murshidabad being desirous to effect an Insurance from loss by Fire for Rs. 51,000 on the following property viz—

One pucca built and roofed bldg (C. J. Vazandah) holding No. 274 274-A, 274 B and 274-C occupied as residence and/or shop for the storage of Hydrogenated G nut oil (vanaspathi) and safety matches also situate at Dhulian, Ward No. IV, District Murshidabad.

Incl. Loss or damage by cyclone, flood and/or change of course of river and/or erosion of river, landslides and/or subsidence.

It is further noted that there is a thatched bldg. or residence within 50 ft. of the above premises for one year from 3rd June, 1950 to 3rd June, 1951.

The said property is hereby held insured against damage by Fire, subject to the terms of the applicant's proposal and to the usual Conditions of the Society's policies. It is, however, expressly stipulated that this protection Note cannot, under any circumstances be applicable for a longer period than thirty days, and that it is also immediately terminated before that date by delivery of the policy, or if the Risk be declined by the notification of such declinature.

Prem.: Rs. 892-8-0 Fire at 28 as per cent.

Prem.: Rs. 382-8-0 Flood and other risks  
at 12 as per cent.

Premium: Rs. 1,275-0-0."

On 7th June the assured sent the premia by cheque. As no policy was received by them, the assured wrote a letter on 1st July (Ex. A/g.) asking for the policy or for extension of the cover-notes. This was not done.

On 6th July, 1950, the Company wrote to the assured two identically worded letters (except for changes in amounts and numbers of the policies) which read :

" Calcutta 6th July, 1950

To

M/s. Chandmull Lal Chand,  
P.O. Dhulian,  
Murshidabad.

Dear Sir,

.....  
.....

In accordance with the inspection report lodged with this Co., we cancel the risk from 6th July, 1950 as noted below.

The relative Endorsement is under preparation and will be forwarded to you in due course.

Yours faithfully,

Sd. Illegible

Ag. Manager and Underwriter.

Nature of Alteration :

The above cover-note is cancelled by the General Assurance Society Ltd., as from 6th July, 1950."

On 15th July, 1950 the assured wrote to say that they held the Company bound because although there was no erosion by the river when the proposals were submitted and accepted, the Company was trying to get out of the contract when the river was eroding the bank. They ended this letter by saying :

" Now when the erosion and/or change of course of river and/or subsidence have commenced, it is quite impossible to take any precautionary measure or to reinsure the same with any other office of Insurance at this stage."

On 17th July, 1950 the Company prepared an endorsement for the policies cancelling the risk and sent the endorsements to the assured. The endorsement read :

" .....  
.....

In the name of :—Messrs. Chandmull Lalchand, P. O. Dhulian, Murshidabad.

It is hereby declared and agreed that as from 6th July, 1950, the insurance by this policy is cancelled by the General Assurance Society Ltd., Calcutta, and a refund premium of Rs. .... is hereby allowed to the assured on a *pro rata* basis.

Sd. Illegible.

Ag. Manager & Underwriter.

Calcutta,

..... "

In reply the latter said that as the risk had already " commenced " and " taken place " there could be no cancellation as there was no time left for the assured to take precautionary measures by reinsuring. In reply the Company referred to Condition 10 of the Fire policy under which the Company claimed to cancel the policy at any time. Condition 10 of the Fire policy read :—

"10 This insurance may be terminated at any time at the request of the Insured in which case the Society will retain the customary short period rate for the time the policy has been in force. This insurance may also at any time be terminated at the option of the Society, on notice to that effect being given to the Insured in which case the Society shall be liable to repay on demand a rateable proportion of the premium for the unexpired terms from the date of the cancellation.

In reply the assured wrote on 2nd August that the condition did not apply to any risk except that of fire and could not, in any event, protect the Company after the risk had commenced. On 13th and 15th August the houses were washed away. After unsuccessfully demanding payment under the policies the assured filed the present suit on the Original Side of the Calcutta High Court. It was dismissed with costs by G. K. Mitter J., but on appeal the claim was decreed to the extent of Rs. 1,10,000 with costs, the decretal amount to carry interest at 3 per cent per annum. The High Court certified the case as fit for appeal and the present appeal has been filed by the Company.

Before we deal with the question in dispute we may say a few words about the position of the Ganges river in relation to the Dhulian town in general and the insured houses in particular. The town of Dhulian is situated on the bank of river which for several years has been changing its course and eroding the bank on the side of Dhulian. In 1949 there was much erosion and the river had come as close as  $1\frac{1}{2}$  to 2 furlongs from the town and a few of the godowns lying close to the bank had been washed away. There is ample material to show what the condition of the river in relation to the insured houses was between 2nd June, 1950, when the proposal for insurance was made and 13th/15th August when the houses were washed away, with particular reference to the 18th June 1950, when one P. K. Ghose (D.W. 2) visited Dhulian to make local inquiries on behalf of the Company and the 6th July, when the Company cancelled the risk and withdrew the cover. The evidence comes from both sides but is mostly consistent. Lalchand Jain (P.W. 1) for the assured stated that on the 2nd of June the houses were 400-500 feet away from the bank of the river (Q-73) and on that date there was no erosion because the river was quite calm (Q-132). This continued to the second week of June (Q-136). The river began to rise in the 3rd week of June but there was no erosion (Q-137). Erosion began by the end of June (Q-142) and the current was then swift (Q-144) and the right bank started to be washed away. Houses within 10-50 feet of the bank were first affected in the last week of June (Q-180). At that time the insured houses were 400-450 feet away. Even on 15th July, 1950 the distance between these houses and the river was 250 feet (Q-179). Surendranath Bhattacharjee (P.W. 2) Overseer and Inspector, Dhulian Municipality, stated that the erosion started four or five days after Rathajatra which took place on or about 20th June, 1950. Bijoy Kumar (P.W. 4), Retired Superintending Engineer, is an important witness. He submitted three reports Exs. F, G and H to Government on 27th May, 1949, 4th November, 1949 and 11th September, 1950. In these reports he gives a description of the scouring of Dhulian town on 5th August 1950. He said nothing about the state of affairs in the first week of July which he would undoubtedly have said if erosion had already begun then. With his report submitted on 11th September, 1950, he sent a letter of 9th August, in which he said that he had visited Dhulian Bazaar on 5th August, 1950, and found that the scouring of the compound of the Police Station at the junction of the Gaoges and Bagmari rivers had begun a fortnight earlier and that scouring must have been at the rate of 20-25 feet per day. From this evidence it is possible to form an opinion about the state of the river on or about 6th July, 1950. To that we shall come later.

The learned single Judge at the trial held that Condition 10 of the policy applied to all the risks covered by the policy and not the risk from fire only. Although the policy was not ready, the proposal not having been declined during the period of the cover note, the learned Judge held the policy was bound to issue and the extent of the protection would thus be according to the Company's usual terms and subject to the conditions in the policy. Relying therefore, upon the dicta of the Judicial Committee in the *Sun Fire Office v. Hart and others*<sup>1</sup>, the learned Judge

gave a wide meaning to Condition 10 and held that the Company was within its rights in cancelling the policy as and when it did. The learned Judge pointed out that the condition was a usual provision in a policy of the fire insurance and an assurer cancelling the policy under that condition, need give no reasons and every defence was open to him and the reasons, if given, could not be examined in a Court of law. Finally, the fact that no reasons were given or that the report of Ghose was not produced or that Ghose did not support Dangali, the Manager, was held to be immaterial because reasons like motives, were held to be immaterial. The suit was accordingly dismissed with costs. An appeal under the Letters Patent was filed against the judgment of the learned single Judge.

The appeal was heard by P. B. Mukharji and S. K. Datta, JJ. The judgment on appeal was delivered by Mukharji, J. In dealing with the cancellation of the policy the learned Judge considered the matter with and without Condition 10. He first considered whether Condition 10 of the policy at all applied. The learned Judge gave eight reasons why it did not. To those reasons we will come presently. The conclusion of the learned Judge was that the policy had not come into existence and did not govern this contract of insurance. As the cover-note was only for a month and on its terms had ceased to be operative, a contract of insurance absolute for one year was spelled out from the letter of acceptance which was said to govern the relations of the parties between 3rd July, 1950 (the date of the expiry of the cover-note) and 6th July, 1950 (when the policy was cancelled) and till 13/15th August, 1950 when the houses were washed away. Condition 10 was thus held to be not applicable. However, assuming that it did, the learned Judge held that it was unreasonable and the cancellation having been done when the loss had already commenced or became so proximate that it could be said to have almost commenced, the Company could not be allowed to invoke it. In reaching this conclusion the decision of the Judicial Committee was not accepted and the width of the condition was cut down. In the result the claim of the assured was decreed in the sum of Rs. 1,10,000 with costs in the appeal and the suit.

There is a preliminary question of fact to which the Courts below have addressed themselves. It is whether the cover notes accompanied the letters of acceptance of the proposals. The learned single Judge seems to imply that they did and the Division Bench holds that they did not. This has led to a divergence of opinion on whether condition 10 of the Fire Policy which enables determination of the policy at will on both sides, at all operated. How this finding leads to a discussion on the applicability of Condition 10, is a very important circumstance and we shall now attempt to do, what we have not done yet, namely, analyse the reasons given in the two decisions of the High Court.

The letters of acceptance state that the "relative cover" in each case was enclosed. These letters were dated 3rd June, 1950, and stated that the assured was covered against risk from 3rd June, 1950 to 3rd June, 1951 and the endorsement at the back of the letters has been reproduced by us earlier. That endorsement did not state any terms and it did not refer to the terms or conditions of any policy. The cover-notes, of which one has also been reproduced in full, held the property insured for a period of 30 days only "subject to the terms of the applicants' proposal and to the usual conditions of the Societies Policies." The learned single Judge held that the letters of acceptance incorporated and attracted by reference the terms and conditions of the cover-notes and through them the terms and conditions of the policy and further held that the relationship could be declined within 30 days under the terms of the cover-note but if not so declined, the relationship would be governed by the terms and conditions of the policy for the whole of the period of insurance. In reaching this conclusion the learned single Judge held that the cover-notes must have accompanied the letters of acceptance and in this way Condition 10 was allowed to play its part.

The Divisional Bench took a different view of the matter. The learned Judges noted that the letters of acceptance spoke of risk for a whole year and stated that

the "relative covers" were enclosed. The cover notes, it was pointed out, bore the date 5th June and must have been sent later than 3rd June, the date of the acceptance of the proposals. The learned Judges observed that the "relative cover" ought to have been a cover for a whole year and if it was for a month only it could not be a "relative cover" because the letter of acceptance undertook the risk for the whole year. Next they held that as the cover notes did not accompany the letters of acceptance, there was no notice to the assured that the terms and conditions of any policy would govern the contract. They found fault with the word 'policies' in the phrase 'usual conditions of the Society's policies' because the word indicated a plurality of policies and not a standard policy. They commented that the standard fire policy applied condition 10 to fire risk and not to risk by flood, cyclone etc. They found the expression 'the said properties are hereunder held insured for damage by fire' insufficient to cover other risks although they admitted that the cover notes spoke of loss or damage by flood, cyclone etc. They next pointed out that the words of the cover note were not "all the conditions of the policy" but only "usual conditions" and by referring to books on the law of insurance they concluded that condition 10 which gave a right to either party to terminate the policy at will, could not be considered a 'usual condition'. They observed that this was not a condition usually included in English policies and appeared to be in vogue in colonial and under-developed countries. They felt that if the fire policy was extended to cover risk of flood, etc., the new risks should have been made expressly subject to condition 10 just as fire risk was made subject to it and that by merely extending a fire policy to cover other risks the assured was made to amend and construe each separate clause. Holding condition 10 to be unreasonable they held that the Company could not cancel the policy on the 6th July because till then there was no policy in existence and the cover note which referred to the policy had automatically worked itself out. They finally held that the cancellation, in any event, was after the risk had commenced and could not be upheld. For these reasons the claim was decreed. The trial Judge had found that there was no attempt to fix the amount of damages but the Divisional Bench reconsidered the matter and gave its own findings.

Although the Divisional Bench went into a detailed discussion (some of which was perhaps not altogether necessary) the problem of liability in this case was well-scanned by Counsel appearing for the parties. They argued the case under three distinct heads which are

- (a) Did condition 10 apply to the facts.
- (b) if it did, how is it to be construed, and
- (c) Was the cancellation of the policy valid in law?

We shall consider the matter under these three broad heads.

The application of condition 10 depends on how far the terms of the policy can be said to be incorporated in this contract of insurance between the parties. The facts relating to the formation of the contract are clear except on the one point relating to the cover notes, and that, in our opinion, has been given undue prominence by the Divisional Bench. It makes no essential difference whether the cover notes accompanied the letters of acceptance or were sent two days later. It is possible that the letters of acceptance themselves were sent on 5th June. It often happens that two letters delivered at the same time bear different dates. The letters of acceptance referred to 'relative covers', but the word 'relative' is not to be stretched too far. Its use here is no instance of unnecessary legalese and it does not add to the purport of the communication that a cover note was being sent. It is obvious that if in the period during which the cover note was operative there was refusal to insure, the assured could not have demanded a policy or insisted that there was insurance without a policy, standard or otherwise, and not subject to any conditions by reason of the acceptance. The cover notes could have been sent later without impairing the effect of the reference to them in the letters of acceptance. By the fortuitous chance of omission to enclose the cover notes the assured did not get any additional rights under the letters of acceptance. Insurance of property is not a bet but a well-

known commercial deal. Acceptance of the proposal read with the cover notes clothed the assured with a right to demand a policy in relation to the kind of insurance he had bought and he could only claim to be covered against risk in the manner laid down in the policy. To avoid this consequence the learned Additional Solicitor-General, arguing on behalf of the assured, faintly suggested that the endorsement at the back of the letter of acceptance was the cover note and it did not refer to any policy. This position was clearly unsustainable. The cover notes were an integral part of the acceptance of the proposals and the two had to be read together.

A contract of insurance is a species of commercial transactions and there is a well-established commercial practice to send cover notes even prior to the completion of a proper proposal or while the proposal is being considered or a policy is in preparation for delivery. A cover note is a temporary and limited agreement. It may be self-contained or it may incorporate by reference the terms and conditions of the future policy. When the cover note incorporates the policy in this manner, it does not have to recite the terms and conditions, but merely to refer to a particular standard policy. If the proposal is for a standard policy and the cover note refer to it, the assured is taken to have accepted the terms of that policy. The reference to the policy and its terms and conditions may be expressed in the proposal or the cover note or even in the letter of acceptance including the cover note. The incorporation of the terms and conditions of the policy may also arise from a combination of references in two or more documents passing between the parties. Documents like the proposal, cover note and the policy are commercial documents and to interpret them commercial habits and practice cannot altogether be ignored. During the time the cover note operates, the relations of the parties are governed by its terms and conditions, if any, but more usually by the terms and conditions of the policy bargained for and to be issued. When this happens the terms of the policy are incipient but after the period of temporary cover, the relations are governed only by the terms and conditions of the policy unless insurance is declined in the meantime. Delay in issuing the policy makes no difference. The relations even then are governed by the future policy if the cover notes give sufficient indication that it would be so. In other respects, there is no difference between a contract of insurance and any other contract except that in a contract of insurance there is a requirement of *uberima fides*, i.e., good faith on the part of the assured and the contract is likely to be construed *contra proferentem* that is against the company in case of ambiguity or doubt. A contract is formed when there is an unqualified acceptance of the proposal. Acceptance may be expressed in writing or it may even be implied if the insurer accepts the premium and retains it. In the case of the assured, a positive act on his part by which he recognises or seeks to enforce the policy amounts to an affirmation of it. This position was clearly recognised by the assured himself, because he wrote, close upon the expiry of the time of the cover notes, that either a policy should be issued to him before that period had expired or the cover note extended in time. In interpreting documents relating to a contract of insurance, the duty of the Court is to interpret the words in which the contract is expressed by the parties, because it is not for the Court to make a new contract, however reasonable, if the parties have not made it themselves. Looking at the proposal, the letter of acceptance and the cover notes, it is clear that a contract of insurance under the standard policy for fire and extended to cover flood, cyclone etc. had come into being.

The letters of acceptance clearly mentioned that cover notes were being sent. The contract of insurance was based upon the cover notes for the period covered by the cover notes. Nothing happened in the 30 days during which the cover notes operated. It is true that the letters of acceptance showed that the risk was covered for the whole year and not for 30 days. This was an unfortunate way of expressing that the acceptance of the proposal would operate in the first instance for 30 days only during which the company would be free to decline the policy. The four essentials of a contract of insurance are, (i) the definition of the risk, (ii) the duration of the risk, (iii) the premium and (iv) the amount of insurance. See Macgillivray on Insurance Law (5th Edition) Volume I, paragraph 656, page 316. But the policy which is issued contains more than these essentials because it lays down and measures the rights of



the parties and each side has obligations which are also defined. To a policy against fire the purpose is not so much to insure the property but to insure the owner of the property against loss. The policy not only defines the risk and its duration but also lays down the special terms and conditions under which the policy may be enforced on either side. Even if the letter of acceptance went beyond the cover notes in the matter of duration, the terms and conditions of the proposed policy would govern the case because when a contract of insuring property is complete, it is immaterial whether the policy is actually delivered after the loss and for the same reason the rights of the parties are governed by the policy to be, between acceptance and delivery of the policy. Even if no terms are specified the terms contained in a policy customarily issued in such cases would apply. There is ample authority for the proposition. In *Corpus Juris Secundum* (Vol 44, page 953) the following occurs:

"Where the contract to insure or issue a policy of fire insurance does not specify the terms and conditions of the policy it is a general rule that the parties will be presumed to have contemplated a form of policy containing such conditions and limitations as are usual in such cases."

See also *Richards on Insurance* (5th Edition) Vol 3, page 1296 paragraph 390. In *Eames v Home Insurance Co*<sup>1</sup>, the Supreme Court of the United States observed:

"If no preliminary contract would be valid unless it specified minutely the terms to be contained in the policy to be issued, no such contract could ever be made or would ever be of any use. The very reason for sustaining such contracts is that the parties may have the benefit of them during that incipient period when the papers are being perfected and transmitted. It is sufficient if one party proposes to be insured and the other party agrees to insure and the subject, the period, the amount and the rate of insurance is ascertained or understood and the premium paid if demanded. It will be presumed that they contemplate such form of policy containing such conditions and limitations as are usual in such cases, or have been used before between the parties. This is the sense and reason of the thing, and any contrary requirement should be expressly notified to the party to be affected by it."

In *General Accident Insurance Corporation v Cronk*<sup>2</sup>, it was also ruled that a person making a proposal must be taken to have applied for the ordinary form of policy issued by the company. It is only when there is a condition precedent that the policy must be delivered that the assurer is not on the risk, otherwise he is. See *Macgillivray* *ibid* (Vol 1, page 325, paragraph 675). In such a case acceptance is merely an intimation that the assurer is willing to issue a policy but there will be no binding contract (*ibid* paragraph 679, page 328). In the present case, there was no such condition precedent and the company was on risk throughout. An insurance was asked for on the policy of the company the usual policy would have issued and as the insurance was from 3rd June, 1950, the policy would have related back to that date. The issuance of the policy does not add to the contract. The incipient terms and conditions of the contract later merge so the policy and the terms and conditions then become express.

The attempt of the assured in this case, therefore, has been to establish that the cover notes having expired, did not bind the parties and the reference to the policy being in the cover notes and not in the letters of acceptance, the terms and conditions of the policy were not attracted. We are satisfied that this is not the true position. The letters of acceptance expressly mentioned the cover notes and the cover notes expressly mentioned the policy. Therefore both during the period of 30 days when the cover notes operated and also thereafter, the terms and conditions of the policy governed the relationship between the parties. We have already held that as there was only one standard fire-policy, the use of the plural word 'policies' made no difference and the delay in sending the cover notes, if any, was also immaterial. The terms and conditions of the usual policy accordingly governed the relations of the parties, and made condition 10 applicable.

It was, however, contended that the policy itself never came into existence, because it was cancelled before it was issued and the endorsement of cancellation was engrossed and incorporated with the making of the policy. It was argued that condition 10 would not come into operation at all, because the policy itself was cancelled before it was engrossed. In other words, the contention is that condition

10 could not operate between the parties till the policy was signed and delivered to the assured and as this never happened the cancellation was improper. This argument is scarcely open, because, the assured is obviously basing his suit on the policy. In his plaint he invoked the policy. The assured cannot sustain the suit except by basing it upon the policy, because unless one reads the policy and the terms on which it was effective, mere reading of the proposals and the letters of acceptance would not give any terms. Further when a contract of insuring property is complete, it is immaterial whether the policy is delivered or not for the rights of the parties are regulated by the policy which ought to be delivered. In this way also the terms and conditions of the standard fire-policy would apply even though the policy was not issued.

It was next contended that the expression 'usual conditions of the Society's policies' could not be read to include condition 10 which was not a usual condition, where it gives a right to terminate the policy at will to the company. This is not correct. Such a condition is mentioned in almost all the books on the law of Insurance. See Halsbury's Laws of England (3rd Edition) Volume, 22, page 245 paragraph 474 ; Macgillivray on Insurance Law (5th Edition) Volume 2, page 963 paragraph 1981 ; Welford and Otter-Barry's Fire Insurance (4th Edition) pages 178, 179 ; and Richards on Insurance (5th Edition), Volume 13, page 1759, paragraph 531. In *The Sun Fire Office v. Hart and others*<sup>1</sup>, such a condition is not only mentioned but also discussed. An identical condition in a fire policy was also mentioned and discussed in a decision of this Court reported in *The Central Bank of India Ltd. v. Hartford Fire Insurance Co., Ltd.*<sup>2</sup>. There was thus nothing unusual in the inclusion of such a condition in the policy and the reference to the usual conditions would, therefore, include a reference to condition 10.

This condition gives mutual rights to the parties to cancel the policy at any time. To the assurer it gives a right to cancel the policy at will. It was contended that such a condition was so unreasonable that it could not be allowed to stand. It was argued on the authority of *Sze Hai Tong Bank Ltd. v. Rambler Cycle Co., Ltd.*<sup>3</sup>, that the extreme width of the condition must be cut down by an implied limitation which was that the main object and intent of the contract should not be allowed to be defeated and that object and intent was the insuring of the property against floods and cancellation of the policy when floods had started would defeat the main object and intent of the contract. This argument mixes up two situations. The first is a question of pure principle. There is nothing wrong in including such a mutual condition for the cancellation of the insurance. An assured may like to invoke such a condition when the policy is found to differ from the policy he agreed to accept or it contained a term or condition to which he did not agree. He may not accept the same policy from another company to which he did not make a proposal. He may invoke this condition if the company transfers its assets and business to another. Just as the assured may like to terminate the policy without assigning any reasons and at his will, the assurer may also do likewise.

Such a clause was considered by the Privy Council in *Sun Fire Office v. Hart*.<sup>1</sup> This was a case of a policy of insurance against fire. Certain fields of sugarcane were insured against fire. After insurance 3 fires happened and an anonymous letter was received that more fires would take place. The policy contained a condition that the insurers might terminate the policy by notice 'by reason of such change, or from any other cause whatever' and the insurers cancelled the policy under that condition. The object of such a condition was stated by Lord Watson to be—

".....to enable the insurers to release themselves from their contract during its currency, leaving it in full vigour down to the time of notice. The words in which the power of determination is expressed, taken by themselves, are very wide and comprehensive. According to their primary and natural meaning, they import that, in order to justify the exercise of the power, nothing is required except the existence of a desire, on the part of the insurers, to get rid of future liability, whether such desire be prompted by causes which prevent the policy attaching, or by any other cause whatever."

1. (1889) L.R. 14 A.C. 98.

2. (1965) 1 Comp.L.J. 226 : (1965) 1 S.C.J.

498 : A.I.R. 1965 S.C. 1288.

3. L.R. (1959) A.C. 576.

In dealing with the further question whether any reasons should be assigned and if so assigned whether they should be such as must satisfy a Court of law, it was further observed

"The question remains whether the clause gives the insurers the right to act upon their own judgment or whether they are bound if so required to allege and prove to the satisfaction of a Judge or Jury not only that a desire exists on their part but that they have reasonable grounds for entertaining it. If the determination of the policy would be for the advantage of its business that would obviously be a reasonable ground for the office desiring to put an end to it. *a priori* one would suppose that the insurers themselves must be the best if not the only capable judges of what will benefit their business. An insurance office may deem it prudent and resolve to limit its outstanding engagements and unless the words of the clause clearly imply the contrary it cannot be presumed that the parties meant to make such a question of prudent administration the subject of inquiry in a Court of law."

The learned Judges of the Divisional Bench did not follow the decision of the Judicial Committee because they found it unacceptable. But a similar view of an ideal condition was taken by this Court in the *Central Bank of India case*<sup>1</sup>. Sarkar, J., there pointed out that a clause in this form was a common term in policies and must therefore be accepted as reasonable and that the right to terminate at will cannot, by reason of the circumstances, be read as a right to terminate for a reasonable cause. In that case the Hartford Office insured certain goods against fire between 20th March, 1947 and March, 1948 in the town of Amritsar. The policy was extended to loss by riot or civil commotion. Riots occurring in July 1947 in the Punjab, a godown in Bakarwana Bazar in Amritsar where insured goods were stored was looted and some goods were lost. The Hartford Office was informed and on 7th August, 1947, they wrote saying that the goods be removed to a safe place or the policy would stand cancelled after 10th August 1947 under condition 10 which was similar to condition 10 here. On 15th August, 1947, the goods were lost by fire. The Hartford Office was held to be protected by the said condition. The reason of the rule appears to be that where parties agree upon certain terms which are to regulate their relationship, it is not for the Court to make a new contract, however reasonable, if the parties have not made it for themselves. The contract here gave equal rights to the parties to cancel the policy at any time and the assurers could therefore invoke the condition to cancel the policy.

It was contended (and it has been so held by the Divisional Bench) that this cancellation was ineffective, because risk had already commenced and the policy could not be cancelled after the liability of the company began. As a general proposition this is perfectly right. Condition 10 is intended to cancel the risk but not to avoid liability for loss which has taken place or to avoid risk which is already turning into loss. It is obvious that a fire policy cannot be cancelled after the house has caught fire. But it is equally clear that unless the risk has already commenced or has become so imminent that it must inevitably take place, such a clause can be invoked. If property is insured against flood it is not open to the insurance company to send couriers on motor cycles ahead of the floods to cancel the policy. But if it is thought that a particular dam was not quite safe, the insurance company will be entitled to cancel the policy against flood before the dam has actually started to crumble or has crumbled. Cancellation is reasonably possible before the liability under the policy has commenced or has become inevitable and it is a question of fact in each case whether the cancellation is legitimate or illegitimate.

In the present case, it was always clear that the Ganges would get into the floods in the rainy season but it was not clear that it would begin to erode the bank in such a way that these houses which were at a distance of 400-500 feet from the bank would inevitably be washed away. The question thus is whether the cancellation was done after liability of the assurer under the policy had commenced or the loss had become inevitable. Here we must look at the evidence which was summarized earlier.

We are concerned with two dates in particular and they are 18th June, 1950, when Ghose visited Dhuban and 6th July when the policy was cancelled. The

houses according to Lalchand Jain (P.W. 1)—were 400/500 feet away when the proposal was made. The river remained calm till the second week of June. It only began to rise in the third week of June. Thus on 18th June, when Ghose visited the place, there was no flood and no erosion. Ghose's report has not been produced but he could have only estimated the possibility of loss and no more. Even in the third week of June there was no erosion and it began by the end of June. Even on 15th July, the distance between the river and the houses was 250 feet (see Q. 179). As the rate of erosion was about 20/25 feet per day (*vide* Bijoy Kumar P.W. 4) the houses were 400/500 feet away even on 6th July. In these circumstances, it cannot be said that the loss had commenced or that it had become so certain as to be inevitable or that the cancellation was done in anticipation and with knowledge of inevitable loss. The cancellation was done at a time when no one could say with any degree of certainty that the houses were in such danger that the loss had commenced or became inevitable. There is no evidence to establish this. This case, therefore, falls within the rule of the *Sun Fire Office*<sup>1</sup> and the *Hartford Fire Insurance Company*,<sup>2</sup> cases. The assurers were, therefore, within their rights under condition 10 of the policy to cancel it. As the policy was not ready they were justified in executing it and cancelling it. The right of the plaintiff to the policy and to enforce it was lost by the legal action of cancellation.

In the result the appeal must succeed. It is allowed. The decree passed by the Divisional Bench is set aside and the judgment of G.K. Mitter, J. dismissing the suit is restored. Although costs must follow the event, we think in the special circumstances of this case we should make no order about costs.

K.G.S.

*Appeal allowed :  
Suit dismissed.*

## THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, K. N. WANCHOO, J. C. SHAH, S. M. SIKRI AND V. RAMASWAMI, JJ.

Sachidananda Banerjee, Assistant Collector of Customs, Calcutta  
and another

.. *Appellants\**

*v.*

Sitaram Agarwala and others

.. *Respondents.*

*Sea Customs Act (VIII of 1878), section 167 (81)—Importing of goods against restrictions under the Act—Smuggled goods passing out of the hands of the actual smuggler—In possession of persons unconnected with actual import—Liability for confiscation—'Concerned' in dealing with prohibited goods—Question depends on facts of each case—Dealing in prohibited goods under a prior arrangement—Accused apprehended in the attempt—Whether 'concerned.'*

*Words and Phrases—'In any way concerned'—'In any manner dealing with prohibited goods'—'Concerned in'—'Deal with.'*

Per Wanchoo, J. (on behalf of the majority) *Subba Rao, J.*, dissenting.—It is well-settled that so long as it is proved that the goods had been imported against the restrictions imposed under Ch. IV of the Act, the goods remain liable to confiscation wherever found even if this is long after the import is over and even if they are in possession of persons who had nothing to do with the actual import.

It is also well-settled that the second part of the penalty relating to any person applies only to a person concerned in the importation or exportation of the goods and does not apply to a person found in possession of the smuggled goods, who had nothing to do with the importation or exportation thereof.

The words 'in any way concerned in any manner dealing with the prohibited goods' in section 167 (81) of the Act are of wide import. It will depend upon the facts found in each case whether it can be said that any person was concerned in dealing with such goods.

1. (1889) L.R. 14 A.C. 98.

2. (1965) 1 Comp.L.J. 226 : (1965) 1 S.C.J.

\* CrI. As. Nos. 192 of 1961, 183 of 1962 and 123 of 1962 with CrI. A. Nos. 41 & 42 of 1964.

The words 'concerned in' mean 'interested in, involved in, mixed up with' while the words 'deal with' mean to have something to do with, to concern oneself to treat, to make arrangement, to negotiate with respect to something.

Therefore when a person enters into some kind of transaction or attempts to enter into some kind of transaction with respect to prohibited goods and it is clear that the act is done with some kind of prior arrangement or agreement it must be held that such a person is concerned in dealing with prohibited goods. The fact that the act stopped at an attempt to purchase (as in the instant case) when the police intervened does not in any way mean that a person was not concerned in dealing with the prohibited goods.

The first part of section 167 (81) has a wider sweep than section 167 (8) and it does not only apply to a person who may have been actually concerned in some way or other with smuggling but also *inter alia* to persons who may have come into possession of goods even after the smuggling was over. So long as the prohibition or restriction remains in force or the duty has not been paid even a third person coming into possession of such goods would have the intention either to evade the prohibition or restriction or defraud the Government of the duty payable thereon. Smuggling does not only stop at importing the goods in the face of prohibition, it envisages subsequent transaction like sale of the smuggled goods. Otherwise there would be a serious lacuna in section 167 (81) of the Act.

*Per Subba Rao J* (contra) Under the first part of section 167 (81) the intention to contravene the prohibition cannot be imputed to subsequent dealers in the prohibited goods after the importer parts with them.

A fair reading of the Act discloses that the Act makes a distinction between a customs offence and a criminal offence. The Legislature has not made the dealings in such goods by persons other than those mentioned in clause 81 a criminal offence. The High Court cannot by construction bring such class of persons within the said clause.

Appeals from the Judgments and Orders dated the 11th August, 1961 of the Calcutta High Court in Criminal Appeals Nos 360 of 1959 and 345 of 1959, and the judgment and order dated 29th August, 1961 of Calcutta High Court in CrI Revision No 137 of 1960 respectively with Appeals by Special Leave from the Judgments and Orders dated the 25th March, 1963 and 13th February, 1963 of the Bombay High Court in Criminal Appeals Nos 1640 of 1962 and 1359 of 1962 respectively.

*Niren De*, Additional Solicitor General of India and *D. R. Prem*, Senior Advocate, (*R. H. Dhebar* and *B. R. G. K. Achar*, Advocates, with them), for Appellant (in Cr.As Nos 192 of 1961 and 183 of 1962)

*D. R. Prem*, Senior Advocate (*B. R. G. K. Achar*, Advocate, with him), *Yogeshwar Prasad*, Advocate, also appeared for the Appellant (in CrI App Nos 41 and 42 of 1964), for Appellant, Asst. Collector of Customs, Calcutta (in Cr. A. No 123 of 1962, and (State of Maharashtra), in Cr. As Nos 41 and 42 of 1964).

*S. G. Mazumdar*, Advocate, for Sitaram Agarwala, Respondent No 1. (in Cr. A. No 192 of 1961)

*P. K. Chatterjee* and *S. P. Varma*, Advocates, for Amin Khan, Respondent No 1 (in Cr. A. No 123 of 1962)

*B. M. Mistry* and *P. R. Vakil*, Advocates, and *J. B. Dadachany*, *O. G. Mathur* and *Raminder Narain* Advocates of *M/s J. B. Dadachany & Co.*, for Hamanmal Karamchand Shah, Respondent (in Cr. A. No 41 of 1964)

*B. R. Agarwala* and *H. K. Puri*, Advocate of *M/s Gagrati & Co.* for Ichha Lal Sukhdeo, Respondent (in Cr. A. No 42 of 1964)

*P. R. Vakil* and *B. M. Mistry*, Advocates, and *J. B. Dadachany*, Advocate of *M/s J. B. Dadachany & Co.* for Phatarmal Rajmal Baldota and others, Interveners (in Cr. A. Nos 41 and 42 of 1964)

The following Judgments of the Court were delivered

*Subba Rao, J.*—I regret my inability to agree on the construction of section 167 (81) of the Sea Customs Act, 1878. The facts have been stated by my learned brother, Wanchoo, J., and I need not restate them.

Clause (81) of section 167 of the Sea Customs Act reads :

"If any person knowingly, and with intent to defraud the Government of any duty payable thereon, or to evade any prohibition or restriction for the time being in force under or by virtue of this Act with respect thereto acquires possession of, or is in any way concerned in carrying, removing depositing, harbouring, keeping or concealing or in any manner dealing with any goods which have been unlawfully removed from a warehouse or which are chargeable with a duty which has not been paid or with respect to the importation or exportation of which any prohibition or restriction is for the time being in force as aforesaid" ;.....

The penalty clause thereof reads :

"such person shall on conviction before a Magistrate be liable to imprisonment for any term not exceeding two years or to fine, or to both."

This clause introduces a criminal offence. It is triable by a magistrate. The person convicted is liable to imprisonment for a term not exceeding two years or to fine or to both. The rule of construction of such a clause creating a criminal offence is well settled. The following passage from the judgment of the Judicial Committee in *The Gauntlet*<sup>1</sup> may be quoted :

"No doubt all penal statutes are to be construed strictly, that is to say, the Court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip, that there has been a *casus omissus*, that the thing is so clearly within the mischief that it must have been intended to be included, and would have been included if thought of. On the other hand, the person charged has a right to say that the thing charged, although within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair commonsense meaning of the language used, and the Court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument."

The clause, therefore, must be construed strictly and it is not open to the Court to strain the language in order to read a *casus omissus*. The Court cannot fill up a lacuna : that is the province of the Legislature. The second rule of construction equally well settled is that a Court cannot construe a section of a statute with reference to that of another unless the latter is *in pari materia* with the former. It follows that decisions made on a provision of a different statute in India or elsewhere will be of no relevance unless the two statutes are *in pari materia*. Any deviation from this rule will destroy the fundamental principle of construction, namely, the duty of a Court is to ascertain the expressed intention of the Legislature. I am led to make these general remarks, as an attempt was made by the learned Counsel for the appellant to persuade us to interpret the words of the clause in the light of the decisions of the English Courts on an analogous provision in an Act intended to prevent smuggling. It is not possible to state that the English and the Indian Acts are *in pari materia*, though their general purposes are the same and though there is some resemblance in the terminology used in them. The English decisions, therefore, must be kept aside in construing the relevant provisions of the Indian statute.

Now coming to the relevant clause, the following material ingredients constitute an offence thereunder : (1) a person must have a knowledge that there is a prohibition or restriction against doing any of the enumerated acts with respect to goods imported or exported contrary to the restriction or prohibition imposed against their import or export ; (2) he must have acted with an intention to evade such a restriction or prohibition ; there is no offence unless the said two elements of *mens rea*, namely, knowledge and intention, are established. It is not enough if a person has only knowledge of such a prohibition or restriction ; in addition he shall have the intention to evade such a prohibition or restriction against the import or export of goods, as the case may be. A person who knowingly purchased smuggled goods from an importer cannot have an intention to evade a prohibition against import, for the prohibited goods have already been imported. A person who receives goods with the knowledge that they are stolen goods cannot possibly have an intention to commit theft, for the theft has already been committed, though he may have the intention to receive the stolen goods. Knowledge of an offence cannot be equated

with an intention to commit the offence. Such a construction effaces the distinction between the two distinct elements of *mens rea*, knowledge and intention, laid down in the clause.

The only possible way out of the inevitable effect of the plain words used in the said clause is to give a meaning to the expression "import" which that word cannot bear. To accept the argument of the learned Counsel for the appellant is to hold that the process of import continues through innumerable transactions between different persons without reference to time or place and whether the goods existed or ceased to exist. Ordinarily the process of import commences the moment the goods cross the customs barrier. That is the meaning given to that word by this Court in *J V Gokal & Co v Assistant Collector of Sales tax*<sup>1</sup>. But the said clause gives that expression a wider meaning. The enumerated dealings with the goods prohibited or restricted covered a field beyond the point of import normally understood by that expression. But all the said dealings have an intimate nexus with the import of goods under the Act. Goods may be imported through the machinery provided under the Act, yet a person may evade the restrictions by fraud or otherwise. Goods may also be illegally imported into India outside the machinery so provided. Thus is done stealthily at different points of the vast sea line of our country. But in either case different persons may take part in carrying, removing, depositing, harbouring, keeping or concealing or in any other manner dealing with any goods so imported. They are the necessary acts to complete the process of import. Such acts may be done by persons between whom there was a pre arranged plan before the goods were brought into India. Different persons may also take part in such dealings with the requisite knowledge or intention for the purpose of completing the import *vis à vis* the importer. Under the said clause, therefore, the process of import does not end immediately the prohibited goods are brought into India, but continues till the goods are delivered to the importer, physically or constructively. The importer who smuggles the goods is certainly guilty under the clause, because he imports them in derogation of the prohibition or restriction. Any person who deals with the goods in the context of the import as explained above in any one of the connected ways with the requisite knowledge and intention would equally be guilty of the offence. But the subsequent transactions in regard to the said goods are outside the process of the enlarged definition of the expression "import". It would be incongruous to hold that a purchaser from the importer or a purchaser from the said purchaser, and so on, has an intention to evade the prohibition or restriction, though he may have the intention to receive the smuggled goods. How does such a purchaser evade the prohibition against import which has already been effected? The contrary construction will lead to the anomaly of a purchaser, even after 20 years of the import, being attributed the intention to evade the prohibition against import. Suppose before the purchase of the goods by a stranger the prohibition was lifted. In such a situation does the purchaser commit an offence? If the contention is sound he does. This illustrates that the crux of the offence is the import of goods with the requisite intent contrary to the prohibition. For the said reasons the intention to contravene the prohibition cannot be imputed to subsequent dealers in the said goods after the importer parts with them.

It is said that if the construction suggested by the learned Counsel for the appellant be not accepted, many a person who purchases smuggled goods will escape punishment. A fair reading of the Act discloses that the Act makes a distinction between a customs offence and a criminal offence. The smuggled goods in the hands of whomsoever they are found can be confiscated and therefore, the State can always trace the smuggled goods to their ultimate destination. The smuggler and the persons concerned in the smuggling are guilty of both customs and criminal offences. The Legislature, either intentionally or otherwise, has not made the dealings in such goods by persons other than those mentioned in clause 81 of section 167 of the Sea Customs Act a criminal offence. When the clause does not bring them in, the Court cannot, by construction, bring such a class of persons

<sup>1</sup> (1960) 5 C.J. 671 (1960) 2 S.C.R. 252, 837, 858

within the said clause. It is for the Legislature to do so and we are told that it has recently amended the section.

I, therefore, agree with the High Court that it has not been established that the respondents have dealt with the goods with an intention to evade any restriction or prohibition imposed on the import of the said goods.

In the result, all the appeals should be dismissed.

*Cr.As. Nos. 192 of 1961 and 183 of 1962.*

*Wanchoo, J.*—These two appeals on certificates granted by the Calcutta High Court arise out of the same trial of the two respondents for an offence under section 167 (81) of the Sea Customs Act, (VIII of 1878), (hereinafter referred to as the Act) and will be dealt with together. The facts are not in dispute and have been found as below.

On 25th August, 1958, a constable attached to the Detective Department, noticed Sitaram Agarwala, respondent and another person at the crossing of Harriam Goenka street and Kalakar street. The constable had certain information with respect to these persons and decided to follow them. These two persons got into a bus and the constable also boarded the same bus. They got down at the junction of B. K. Pal Avenue and J.M. Avenue and so did the constable. They then went to Narendra Dev Square which is a kind of park. The constable kept watch over them from a distance. After a short time these two men came out of the park and stood on the western foot-path of J.M. Avenue. Shortly thereafter a small taxi came there from the south and stopped. Respondent Wang Chit Khaw (hereinafter referred to as the Chinese accused) was in that taxi. He came down and shook hands with Sitaram Agarwala and the three got into the taxi. When the taxi was about to start, the constable disclosed his identity to the driver and asked him to stop. He also asked the three persons to accompany him to the thana. Thereupon Sitaram Agarwala and the other man who was with him came out of the taxi and tried to run away. The constable caught hold of them and put them in the Police wagon which happened to come up just then. The Chinese accused also tried to run away. The constable appealed to the members of the public to help him in securing the Chinese accused and he was secured with the help of two college students and one other young man. As the Chinese accused was running away he threw away three packets which were picked up. In the meantime Sergeant Mukherjee came there on a motor-cycle from the opposite direction and detained the Chinese accused. The three packets thrown away by him were also handed over by the three young men to the Sergeant. Thereafter all the three persons who were arrested were taken to the Police Station along with the three packets. It was found in the Police Station that the three packets contained 23 gold bars of about sixteen tolas each with Chinese inscription thereon. On search of the person of Sitaram Agarwala a sum of Rs. 49,320 in notes of various denomination was found on him. The customs authorities were informed and took charge of the gold bars. Eventually, the gold bars were confiscated under section 167 (8) of the Act and thereafter the Police after investigation prosecuted the two respondents and the third man in respect of the offence under section 167 (81) of the Act.

These facts were held to be proved by the magistrate so far as the Chinese accused and Sitaram were concerned. He therefore convicted them. The case against the third man was held to be doubtful and he was acquitted. The two convicted persons then filed separate appeals in the High Court. The High Court accepted the findings of fact recorded by the learned magistrate and came to the conclusion that on the facts proved there was no doubt that Sitaram had gone with a large sum of money to meet the Chinese accused in order to purchase the gold bars which had been recovered from the packets thrown away by the Chinese accused.

The High Court then addressed itself to the question whether on the facts<sup>s</sup> proved the conviction of the two respondents could be sustained in law. The charge against Sitaram Agarwala was that on the date in question and at the time and place which appeared in the evidence he had gone there by previous arrangement to pur-



chase the smuggled gold bars from the Chinese accused and was therefore concerned in dealing with smuggled gold and thereby committed an offence under section 167 (81) of the Act. The charge against the Chinese accused was that he had in his possession 23 smuggled gold bars which he wanted to sell to Sitaram Agarwala and another person by previous arrangement and as such he was concerned in dealing with smuggled gold and was guilty under section 167 (81) of the Act. So far as Sitaram Agarwala was concerned, the High Court held that by merely going to the park in order to purchase smuggled gold by previous arrangement, it could not be said that Sitaram Agarwala was in any manner dealing with smuggled gold. The High Court was of the view that there was a mere attempt to purchase smuggled gold on the part of Sitaram Agarwala, but as the purchase was not completed it could not be said that Sitaram Agarwala was concerned in dealing with the smuggled gold. The High Court therefore ordered the acquittal of Sitaram Agarwala respondent. As to the Chinese accused, the High Court held that though he was found in possession of smuggled gold, which he knew to be such, and had attempted to sell that gold surreptitiously, section 167 (81) required knowledge that the article in question was smuggled and intention to defraud the Government of any duty payable thereon or to evade any prohibition or restriction for the time being in force under or by virtue of the Act. In view of the intent necessary, the High Court was of the view that before a person could be convicted under section 167 (81) it must be shown that he was either a direct importer or concerned in some way in the import of the smuggled article. In other words, the High Court thought that the section dealt with goods while they were being smuggled, it did not include in its scope a person who subsequently obtained the smuggled goods and then dealt with them, though the smuggled goods themselves might be liable to confiscation when seized. Consequently, the High Court ordered the acquittal of the Chinese accused also. As the interpretation of section 167 (81) was involved, the High Court granted certificates, and that is how the two appeals have come up before us.

The facts are not in dispute in this case and have been set out above. Thus the question that arises before us is the interpretation of section 167 (81) and two aspects of that section have to be considered. The first aspect is the ambit of the words "in any way concerned in any manner dealing with any goods with respect to the importation of which any prohibition or restriction is for the time being in force as aforesaid". The second aspect is with respect to the intent necessary under the section and whether that intent can arise where smuggling is over and smuggled goods are in the possession of persons other than those actually concerned in the smuggling and are then dealt with by them in some manner or other.

We may briefly indicate the scheme of the Act in order to appreciate the purpose behind section 167 (81). The object of the Act is to provide machinery for the collection *inter alia* of import duties and for the prevention of smuggling. With that object customs frontiers are defined, (Chapter I), customs officers are appointed with certain powers (Chapter II), ports, wharves, custom houses, warehouses and boarding and landing stations are provided for, (Chapter III), prohibitions and restrictions of imports and exports are envisaged, (Chapter IV), levy of and exemption from custom duties and the manner in which it has to be done is provided, (Chapter V), drawbacks *i.e.*, refunds are provided in certain circumstances (Chapter VI), arrival and departure of vessels is controlled, (Chapters VII and VIII), provision is made for the discharge of cargo, (Chapter IX), and clearance of goods for home consumption (Chapter X), provision is also made for warehousing and transshipment, (Chapters XI, XII), provisions are also made for exportation or shipment and re-landing (Chapter XIII), special provisions have been made relating to spirit (Chapter XIV) and coasting trade (Chapter XV). Then comes Chapter XVI dealing with offences and penalties. Offences enumerated in Chapter XVI are of two kinds, first there are contraventions of the Act and rules thereunder which are dealt with by customs officers and the penalty for which is imposed by them. These may be compendiously called customs offences. Besides these there are criminal offences which are dealt with by magistrates and which result in conviction and sentence of imprisonment and/or fine. These two kinds of offences

have been created to ensure that no fraud is committed in the matter of payment of duty and also to ensure that there is no smuggling of goods, without payment of duty or in defiance of any prohibition or restriction imposed under Chapter IV of the Act.

It is necessary for our purpose to set out two provisions of section 167 which is in Chapter XVI. These are sections 167 (8) and 167 (81). Section 167 (8) is in these terms :—

“167. The offences mentioned in the first column of the following schedule shall be punishable to the extent mentioned in the third column of the same with reference to such offences respectively :—

Offences.	Section of this Act to which Offence has reference	Penalties.
(8) If any goods, the importation or exportation of which is for the time being prohibited or restricted by or under Chapter IV of this Act, be imported into or exported from India contrary to such prohibition or restriction ; or Etc. Etc.	18 & 19	such goods shall be liable to confiscation ; and any person concerned in any such offence shall be liable to a penalty not exceeding three times the value of the goods, or not exceeding one thousand rupees.”

Section 167 (81) with which we are particularly concerned reads thus :

“ (81). If any person knowingly, and with intent to defraud the Government of any duty payable thereon, or to evade any prohibition or restriction for the time being in force under or by virtue of this Act with respect thereto acquires possession of, or is in any way concerned in carrying, removing, depositing, harbouring, keeping or concealing or in any manner dealing with any goods which have been unlawfully removed from a warehouse or which are chargeable with a duty which has not been paid or with respect to the importation or exportation of which any prohibition or restriction is for the time being in force as aforesaid or	General	such person shall on conviction before a Magistrate be liable to imprisonment for any term not exceeding two years or to fine, or to both ;
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It will be seen that section 167 (8) deals with what we have called customs offences while section 167 (81) deals with criminal offences. It is well-settled by the decisions of this Court that goods which have been imported against the prohibition or restriction imposed under Chapter IV of the Act are liable to confiscation at any time after import and this liability extends even in the hands of third persons who may not have had anything to do with the actual import. So long as it is proved that the goods had been imported against the restrictions imposed under Chapter IV, the goods remain liable to confiscation whenever found even if this is long after the import is over and even if they are in possession of persons who had nothing to do with the actual import. It is also well-settled by the decisions of this Court that the second part of the penalty relating to any person applies only to a person concerned in the importation or exportation of the goods and does not apply to a person found in possession of the smuggled goods who had nothing to do with the importation or exportation thereof : (see *Shivanarayana Mahato v. Collector of Central Excise and Land Customs*).<sup>1</sup>.

1. C.A. No. 288 of 1964, decided on 14th August, 1965.

The main contention of the respondents which has found favour with the High Court was that section 167 (81) when it deals with persons and subjects them to imprisonment and fine on conviction by a magistrate is also concerned with persons who are in some way or other actually concerned in the import and has no application to third persons who had nothing to do with the actual import but might have come in possession of smuggled goods even knowingly after they had been smuggled. Before however we consider this contention which has found favour with the High Court we should like to dispose of the other contention which was raised on behalf of Sitaram Agarwala and which also found favour with the High Court. It will be seen that section 167 (81) deals with persons who do certain things with the knowledge and intent therein specified and one such person with whom that provision deals is a person who is in any way concerned in any manner dealing with any goods with respect to importation of which any prohibition or restriction is for the time being in force. The High Court has held on the facts in this case that Sitaram Agarwala cannot be said to have been concerned in any manner dealing with prohibited goods inasmuch as he was merely negotiating with the Chinese accused for their purchase but the deal had not been concluded. The view which found favour with the High Court thus was that if the deal had been completed, Sitaram Agarwala could be said to have been concerned in dealing with the prohibited goods but as the deal was not completed and he was merely attempting to purchase the goods it could not be said that he was in any way concerned in any manner dealing with them. We are of opinion that the view taken by the High Court is not correct. The words "in any way concerned in any manner dealing with prohibited goods" are of very wide import. It is neither desirable nor necessary to define all manner of connection with the prohibited goods which might come within the meaning of the words "in any way concerned in any manner dealing with such goods". It will depend on the facts found in each case whether it can be said that any person was concerned in dealing with such goods. We shall therefore confine ourselves to the facts of the present case and see whether on these facts it can be said that Sitaram was in any way concerned in any manner dealing with the goods. Now the evidence which has been accepted by both the Courts is that Sitaram had gone with a large sum of money to purchase the gold which was known to be smuggled and to have been imported into India against the restrictions imposed on the import of gold. It has also been proved that Sitaram did so after previous arrangement with the Chinese accused. If the constable who was following Sitaram had not interfered the deal would have gone through and Sitaram would have paid the money and purchased the smuggled gold. Thus was a case therefore where by means of previous arrangement with a person in possession of a smuggled article, the intending purchaser had gone to purchase it and the deal did not go through only because the police intervened. In such circumstances where by previous agreement or arrangement a person goes to purchase an article which he knows to be smuggled it would in our opinion be a case where such a person must be held to be concerned in dealing with the prohibited goods. Where a person does any overt act in relation to prohibited goods which he knows to be such and the act is done in consequence of a previous arrangement or agreement it would in our opinion be a case where the person doing the act is concerned in dealing with the prohibited goods. In other words any transaction relating to prohibited goods which is done or attempted to be done after some kind of prior arrangement or agreement would in our opinion clearly amount to the person being concerned in dealing with the prohibited goods. Both the words "concerned" and "deal" have a wide connotation. The words "concerned in" mean "interested in, involved in mixed up with" while the words "deal with" mean "to have something to do with to concerned one-self, to treat, to make arrangement, to negotiate with respect to something". Therefore when a person enters into some kind of transaction or attempts to enter into some kind of transaction with respect to prohibited goods and it is clear that the act is done with some kind of prior arrangement or agreement, it must be held that such a person is concerned in dealing with prohibited goods. The fact that the act stopped at an attempt to purchase as in the present case when the police intervened does not in any way mean that Sitaram was not concerned in

dealing with the smuggled gold. The evidence shows that there must have been a previous arrangement with the Chinese accused to purchase the smuggled gold. Sitaram went to the appointed place and met the Chinese accused surreptitiously and had a large sum of money with him to pay for the gold. He had sat down with the Chinese accused in the taxi and there is no doubt that if the taxi had not been stopped, the transaction for the purchase of the smuggled gold would have gone through. In these circumstances even though Sitaram had not come into actual possession of the smuggled gold before the police intervened, there is no doubt that he was concerned in dealing with prohibited goods. We are therefore of opinion that the High Court was in error in holding simply because the purchase was not complete that Sitaram was not concerned in dealing with the smuggled gold which was found with the Chinese accused. The acquittal of Sitaram on this ground must therefore be set aside.

This brings us to the main question which arises in the present appeal, namely, what is the intent required in a case coming under section 167 (81) and whether such intent can be said to arise at all in a case where the import is complete and the prohibited goods are in the possession of a third person who had nothing to do with the import. For this purpose we shall refer to that part of section 167 (81) which deals with the acquisition of possession of prohibited goods and what we say about that part will equally apply to the other parts of section 167 (81). We may add that we are dealing here with the first half of section 167 (81) and not with the second half. This part of section 167 (81) which we have taken for the purpose of finding out what is the knowledge and intent that section 167 (81) requires would run thus :

“ If any person knowingly, and with intent to defraud the Government of any duty payable thereon, or to evade any prohibition or restriction for the time being in force under or by virtue of the Act with respect thereto acquires possession of any goods with respect to which duty has not been paid or with respect to the importation of which any prohibition or restriction is for the time being in force.”

The argument which has found favour with the High Court is that the section requires knowledge on the part of the accused that the goods were imported against the prohibition or restriction in force. This is undoubtedly so. The section further requires that the person who has this knowledge should also have the intention either to defraud the Government of any duty payable thereon or to evade any prohibition or restriction for the time being in force under or by virtue of the Act. Mere knowledge that the goods are prohibited goods or goods on which duty has not been paid would not be enough ; the section further requires that there should be an intent to defraud the Government of the duty payable or to evade any prohibition or restriction. The argument on behalf of the respondents which has been accepted by the High Court is that once the goods have evaded the payment of duty or have evaded the prohibition or restriction with respect to their import and the smuggling whether of dutiable or prohibited goods is complete, a third person who comes into possession of such goods thereafter and who had nothing to do with the smuggling itself cannot be said to have the intent to defraud the Government of any duty payable (for such defrauding had already taken place) or to evade any prohibition or restriction (for such prohibition or restriction had already been evaded). In effect, the argument is that this part of section 167 (81) corresponds to section 167 (8) where a person has to be concerned in the actual importation before he can be liable to a penalty.

Now if the intention of the Legislature was that the person guilty under section 167 (81) could only be a person who was concerned in some way or other with the actual importation or exportation it would have been easy for it to use the same words in section 167 (81) as were used in the first part of section 167 (8). But the Legislature has not done so and the question is whether the words used in section 167 (81) have a different meaning from those used in section 167 (8). What section 167 (81) requires is that the person who comes *inter alia* into possession of prohibited goods must know that there is some prohibition in force with respect thereto. But before he can be guilty under section 167 (81) it has further to be shown that he

intends to evade the prohibition. Where the case is not of prohibition but of duty, the person accused under section 167 (81) must be shown to know that the duty has not been paid and also to have the intention to defraud the Government of the duty payable on the goods. The question that arises is whether the third person who has come into possession knowingly that the goods are prohibited or the goods are dutiable and the duty has not been paid can be said to have the intention of evading the prohibition or to defraud the Government of the duty payable, even though he may not have anything to do with the smuggling of the goods.

It seems to us (taking a case of prohibition) that if the prohibition is still in force, the person who acquires possession of prohibited goods knowing them to be prohibited intends to evade the prohibition by the action, even though he may not have been concerned in the actual smuggling of the goods. So long as the prohibition lasts any person who comes into possession of prohibited goods, though he may not be concerned in the actual smuggling would still in our opinion have the intent to evade the prohibition when he remains in possession of the goods which are prohibited. The prohibition in our opinion does not come to an end as soon as the customs frontier is crossed. So long as prohibition is in force and the goods are prohibited goods any person in possession thereof, even though he may not be concerned with the actual smuggling would still be guilty of evading the prohibition by keeping the goods in his possession. If this were not so, it would mean that once the prohibition has been successfully evaded by the actual smuggler the goods would be free from the taint of prohibition and could be dealt with by any person as if there is no prohibition with respect to them. If that were to be the meaning of section 167 (81) there would be a serious lacuna in this provisions which is meant to prevent smuggling. Smuggling does not only stop at importing the goods in the face of prohibition, it envisages subsequent transactions like sale of the smuggled goods for no one would take the risk of smuggling unless he can find a market for smuggled goods. Therefore the purchaser of smuggled goods though he may not be concerned in the smuggling would in our opinion be equally guilty of evading the prohibition by making the purchase. The same in our opinion applies to defrauding the Government of the duty. Where goods had been smuggled in without paying duty the smuggler in such a case also intends to sell the goods and make profit thereby. The purchaser of such smuggled goods even though he may have nothing to do with actual smuggling, usually acquires the goods at a lower price because the payment of duty has been evaded. Therefore when such goods reach even third hands there is always the intention to defraud the Government of the duty payable on the goods. This appears to us to be the true interpretation of section 167 (81), which as we have said earlier is in different words from the first part of section 167 (81), which deals with actual importation or exportation. Section 167 (81) does not deal with actual importation or exportation, it deals with defrauding the Government of the duty payable or evading the prohibition or restriction. So long as the duty is payable and has not been paid or so long as the prohibition or restriction remains in force any person acquiring possession of goods on which duty has not been paid or restriction or prohibition has been evaded would have the intent either to defraud the Government of the duty payable for he acquires goods at a lower price or would have the intention to evade restriction or prohibition. If this were not so, there would be a premium on successful smuggling and once the goods have entered the country without paying duty or have entered the country after evading the prohibition or restriction, they can be dealt with as if they were duty-paid goods or goods which had not evaded the prohibition or restriction. The purpose of section 167 (81) is to punish smuggling and stop it if possible. That purpose in our opinion would be completely defeated if the interpretation which has found favour with the High Court were accepted. We cannot therefore accept that the words used in section 167 (81) only apply up to the stage of actual importation and the person who is guilty thereunder must be somehow concerned in the actual importation. It seems to us that they apply in the case of prohibited or restricted goods so long as the prohibition or restriction lasts and whoever is in possession of such goods or comes into possession thereof, even after the smuggling is

over must be attributed with the intention of evading the prohibition or restriction provided he knows that the goods were smuggled into the country in spite of the prohibition or restriction. Similarly where the goods are dutiable and the duty has not been paid on them any person acquires them with the knowledge that the duty thereon has not been paid would have the intention to defraud the Government of duty, even though he may not be the person actually concerned in the smuggling. We therefore hold that section 167 (81) has a wider sweep than section 167 (8) and it does not only apply to a person who may have been actually concerned in some way or other with smuggling but also *inter alia* to persons who may have come into possession of goods even after the smuggling was over. So long as the prohibition or restriction remains in force or the duty has not been paid even a third person coming into possession of such goods would have the intention either to evade the prohibition or restriction or to defraud the Government of the duty payable thereon.

It remains now to refer to a few English cases because our Act of 1878 was modelled on the English Customs Consolidation Act, 1876. Decisions of English Courts therefore with respect to corresponding provisions of the English Act would in our opinion be helpful in the matter of the interpretation of section 167 (81).

Section 186 of the English Act corresponds to many of the provisions contained in section 167 of the Act. In particular, the provision corresponding to section 167 (81) is in these terms :—

“Every person who ..... shall be in any way knowingly concerned in carrying, removing, depositing, concealing, or in any manner dealing with any such goods with intent to defraud Her Majesty of any duties due thereon or to evade any prohibition or restriction of or application to such goods.....”

“Such goods” in the context of the section mean either prohibited or restricted goods or goods on which duty is leviable.

The other clauses of section 186 of the English Act do not specifically contain words relating to intent. But in *Frailey v. Charlton*<sup>1</sup>, it was decided, that intent to defraud the revenue or to evade a restriction or prohibition would apply to other clauses of section 186 also. Thus the English Act by section 186 also requires that a person who was concerned in carrying, removing, etc., or in any manner dealing with any prohibited or restricted goods or dutiable goods must do so knowingly and with intent to defraud His Majesty of any duty due thereon or to evade any restriction or prohibition.

The interpretation of this provision in section 186 was considered in *Beck v. Binks*<sup>2</sup>. In that case the facts were that a person was found in possession of uncustomed goods in London and it was urged, as was urged before the High Court in the present case, that the person concerned could not be said to be carrying the uncustomed goods with intent to defraud His Majesty of the duty because such an offence could only be committed by the actual smugglers or importers of goods or persons engaged in carrying the goods from the ship, etc. at the port of importation with intent to evade the payment of duty or tax. This contention was negatived and the Court held that

“the offence of knowingly carrying or in any manner dealing with uncustomed goods with intent to defraud His Majesty of the duty due thereon contrary to section 186 is not only committed at the port of entry or the place where the goods are actually landed, it is committed anywhere in the realm by a person acting in the manner described by the sub-section.”

Lord Goddard, C.J., made the following observations at page 252 :—

“If a person is knowingly carrying uncustomed goods, he is assisting in the smuggling of the goods; for while goods are no doubt smuggled when they are brought into the country it is no good bringing smuggled goods into the country unless something can be done with them. Such a person is intending to defraud His Majesty of the customs as much as anybody else. The intent is there. It is all part of one operation..... Otherwise, a most extraordinary lacuna is left in the Act, for it can then be said that, once a man has got away from the port of entry or from the place where the “goods were actually landed”, no one dealing with the smuggled goods and carrying them inland will ever be guilty of an offence. I do not think that that has ever been held, and I am certainly not

prepared to hold it now I think it clear that this appellant was dealing with—that is carrying—uncustomed goods and that he was carrying them with intent to defraud His Majesty of the duties thereon.<sup>1</sup>

The next case to which reference may be made is *Rex v Cohen*<sup>2</sup>. In that case 362 Swiss watches which were uncustomed were recovered from the accused and he was charged with being in possession of uncustomed goods with intent to defraud His Majesty of the duties thereon contrary to section 186 of the English Act. Dealing with the question of intent to defraud, it was held that if the accused knew that the goods were uncustomed, the intention to defraud the revenue may be inferred. Here also the uncustomed goods were recovered from the house of the accused at Edgware and there was nothing to show that he was in any way concerned with actual smuggling. Even so, the Court held that he must be held to be intending to defraud the revenue.

The next case to which reference may be made is *Sayce v Coupe*<sup>3</sup>. In that case the accused was in possession of certain American cigarettes on which duty had not been paid. It was held that where a person has in his possession goods which are to his knowledge uncustomed and which he intends to use or sell, he is guilty of the offence of keeping uncustomed goods with intent to defraud the revenue of the duties thereon contrary to section 186. In that case there was nothing to show that the accused had anything to do with the importation or smuggling of the goods. Even so, it was held that he had the intent to defraud the revenue.

The next case to which reference may be made is *Schneider v Dawson*<sup>3</sup>. That was a case where a civilian bought from American servicemen cigars and spirits which had been imported free of duty for the use of United States Servicemen under an agreement between the British and American Governments and kept them for his own use. He was charged with knowingly and with intent to defraud Her Majesty of the duty payable thereon being concerned in keeping goods which were chargeable with duty on which duty had not been paid. It was held that the person's conduct clearly amounted to keeping the smuggled goods and there was intent to defraud the revenue. This case was under the English Customs and Excise Act of 1932, but the principle under the English Act of 1876 was followed.

These cases clearly indicate that the offence under the corresponding provision of the English Act can be committed long after the actual smuggling is over and even if the person found in possession of goods on which duty had not been paid had nothing to do with smuggling. These cases thus clearly support the interpretation we have put on the relevant words of section 167 (81).

Further the case of *Schneider*<sup>1</sup>, shows that it has always been held in England that if dutiable goods have been brought into the country without paying the duty, the duty attaches to goods brought into the country and though it may not have been paid at the moment of bringing the goods for some special reasons (as, for example, where it is meant for a Foreign Ambassador) the duty, is leviable later on when the goods pass into the hands of persons other than the privileged person. The same in our view applies equally to goods which are smuggled into the country and the duty has been evaded. The duty always remains payable on goods which have been brought in without payment of duty and whoever deals with them even at a later stage after the operation of smuggling is over would still be liable to pay the duty and if he does not, he must have the intention to defraud the Government of revenue. The same applies to prohibition and restriction and so long as the prohibition or restriction remains in force, the person dealing with the smuggled goods which had evaded the prohibition or restriction must also be held to evade the prohibition or restriction. In the view that we have taken it is therefore unnecessary to consider when the import or smuggling ends, for section 167 (81) hits not only persons concerned in smuggling or importing but also all others who come into possession of or deal with smuggled goods after the smuggling is over.

<sup>1</sup> L.R. (1951) 1 K.B. 50.

<sup>2</sup> L.R. (1953) 1 K.B. 1.

<sup>3</sup> L.R. (1960) 2 Q.B. 109.

Lastly learned Counsel for the respondents refers us to section 135 of the Customs Act (LII of 1962). That section provides for what was formerly provided in section 167 (81) of the Act. The argument is that it is in very different terms. That is undoubtedly so. But it does not follow from the fact that the corresponding section in the 1962 Act is differently worded that the provisions in section 167 (81) cannot have the meaning which is being pressed before us on behalf of the appellant. The interpretation of section 167 (81) must depend upon the language of that provision itself and on the language used in section 167 (81) we have no doubt that it applies not only to an actual smuggler or a person concerned in smuggling but also to all others who may be concerned with smuggled goods after the smuggling is over.

In the view that we have taken of the meaning of section 167 (81) it follows that on facts found Sitaram Agarwala was concerned in dealing with prohibited or restricted goods. It also follows on facts found that he had the necessary knowledge and intent to evade the prohibition or the restriction even though he dealt with the goods after the smuggling was over and was not in any way concerned with actual smuggling. He would therefore be guilty under section 167 (81) of the Act. We therefore allow the appeal, set aside the order of acquittal made by the High Court, restore the order of the Presidency Magistrate and confirm the sentence passed on Sitaram Agarwala by the Magistrate.

It also follows on facts found that Wang Chit Khaw is guilty under section 167 (81) inasmuch as he was dealing with prohibited or restricted goods and had the necessary knowledge and intent as required under that section. We therefore allow the appeal, set aside the order of the High Court, restore that of the Presidency Magistrate and confirm the sentence passed on him by the Magistrate.

*Crl.A. No. 123 of 1962.*

*Wanchoo, J.*—This is an appeal by Special Leave against the judgment of the Calcutta High Court by which the respondent Amin Khan was acquitted of an offence under section 167 (81) of the Sea Customs Act (VIII of 1878).

The charge against the respondent was that he on or about 15th July, 1959, at Circular Garden Reach Road, knowingly and with intent to evade the prohibition in force under section 19 of the Sea Customs Act read with section 23-A of the Foreign Exchange Regulation Act, 1947, acquired possession of sixty bars of gold with respect to importation of which the said prohibition was in force on the date aforesaid. The learned Magistrate before whom the trial took place found that Amin Khan came in a taxi which stood opposite Gate No. 5 of Kidderpore dock. At that time a ship from the Far East, namely, *S. S. Sangola* was berthed at Kidderpore dock and there was some information with the customs authorities in connection with that ship and consequently Customs Inspector Samsul Huq was on duty at the gate to keep an eye on things. The taxi in which the respondent Amin Khan came arrived at about 7-10 A.M. on 15th July, 1959 and waited opposite gate No. 5, Kidderpore dock. There was one occupant on the rear seat of the taxi, namely, Amin Khan while the driver of the taxi was sitting in the driver's seat. Amin Khan had come down from the taxi and appeared to be restless. Shortly thereafter, Amin Khan got back into the taxi. But as there was a crowd there, Samsul Huq, though he could see Amin Khan while he was on the road and was getting into the taxi, could not keep the taxi in full view. Soon after Amin Khan got into the taxi and it started. Thereupon Samsul Huq stopped the taxi and rushed forward along with other customs officers. Amin Khan was then sitting in the rear seat of the taxi with a small attache case beside him. Samsul Huq asked Amin Khan what the attache case contained and Amin Khan replied that it contained gold. Thereafter the attache case was opened and it was found to contain 60 gold bars in six packets under a cotton jacket which was also in the attache case. Each packet contained 10 gold bars. Thereafter Amin Khan was arrested. Later the gold bars were confiscated under the Act and Amin Khan was prosecuted under section 167 (81). The Magistrate after finding these facts convicted Amin Khan and sentenced him to one year's rigorous imprisonment, his defence that the attache case had been planted by a customs officer having been disbelieved by



the Magistrate. It may be mentioned that the gold bars were worth about Rs. 1,15,000. He unsuccessfully appealed to the Session Judge, Alipore.

Amin Khan then went in revision to the High Court. The High Court considered the evidence and held that there was no doubt that the gold bars were foreign and imported. It was proved that in view of the restriction in force foreign gold could not be imported by anybody without a special permit of the Reserve Bank of India and Amin Khan did not claim to have any such permit. Finally the High Court found that there was no doubt that Amin Khan was in possession of this smuggled gold. The High Court then went on to consider the question whether the charge framed against Amin Khan had been proved. We have already mentioned the charge, namely, that on or about 15th July, 1959 at Circular Garden Reach Road, Amin Khan acquired possession of these gold bars knowingly and with intent to evade the prohibition in force at the time. The specific charge thus against Amin Khan was that he acquired possession of these gold bars on 15th July, 1959 outside Gate No. 5 of the Kidderpore dock. The suggestion of the prosecution was that the gold bars had been smuggled out of *S. S. Sangola* on that morning and handed over to Amin Khan who thus acquired possession of them that morning knowingly and with intent to avoid the prohibition or restriction in force. The High Court has found that there was no evidence to show that anybody actually came out of the dock area and handed over the gold bars either to Amin Khan or put them in the taxi to the knowledge of Amin Khan. Samsul Huq who was watching at the time was unable to say if any one had put the attache case containing the gold bars in the taxi, for, according to him, there was a crowd at that place and time and he could not keep the taxi in full view all the time. The High Court therefore took the view that it could not be ruled out that Amin Khan might have been in possession of the gold bars from before the taxi reached the Kidderpore dock. If that was so, it could not be said that Amin Khan had acquired possession of the gold bars outside Kidderpore dock that morning at 7-10 A.M. knowingly or with intent to avoid a prohibition or restriction. The High Court further observed that the presence of Amin Khan near the dock area with a large quantity of gold was very suspicious, but in view of the nature of the evidence that the customs officers were on watch from before and did not see Amin Khan going into the dock area or did not see any one else dropping the attache case into the taxi, it could not be held that Amin Khan had acquired possession of the gold bars that morning at that place. That being so, the High Court was of the view that Amin Khan must be given the benefit of doubt in respect of the charge framed against him and consequently acquitted him.

This is an appeal under Article 136 of the Constitution and we cannot say in the circumstances that the view taken by the High Court is necessarily incorrect, keeping in mind the charge that was framed against Amin Khan. In view of our decision in *Shri Sachidananda Beneryi, Assistant Collector of Customs v. Sita Ram Agarwala*<sup>1</sup>, (the judgment in which is being delivered today), the matter would have been different if the charge against Amin Khan was not of acquiring possession of prohibited goods that morning at that place but merely of carrying, keeping or concealing such goods. Unfortunately that was not the charge against Amin Khan. The charge was that he had acquired the prohibited goods that morning at that place. That being the nature of the charge against Amin Khan, it cannot be said that the High Court was in error in holding that in the absence of sufficient evidence to show that Amin Khan had gone into the dock area and had come out from there with the attache case or somebody else had come out of the dock area and had dropped the attache case in the taxi to the knowledge of Amin Khan, the charge had not been proved beyond reasonable doubt. We emphasise again that Amin Khan gets away only because of the specific charge framed against him and the matter might have been different if the charge had been, for example, for keeping or concealing or carrying prohibited goods with the necessary knowledge and intent. In this view of the matter, the appeal fails and is hereby dismissed.

*Crl.As. Nos. 41 and 42 of 1964.*

*Wanchoo, J.*—These two appeals by Special Leave from the judgment of the High Court of Bombay raise a common question of law and will be dealt with together. The question which arises in these cases relates to the interpretation of section 167 (81) of the Sea Customs Act (VIII of 1878). We do not think it necessary to refer to the facts of these cases because the High Court did not hear the respondents on other grounds of appeal except one relating to the intent necessary under section 167 (81). The High Court took the view following the decision of the Calcutta High Court in the case of *Sita Ram Agarwala v. The State*<sup>1</sup> (which has been dealt with by us in *Shri Sachidananda Benerji, Assistant Collector of Customs v. Sita Ram Agarwala*<sup>2</sup>, in which judgment is being delivered today) that the intent necessary for conviction under section 167 (81) could only apply to a person who was in any manner concerned in the actual smuggling or importation of the goods and could not apply to persons who dealt with smuggled goods after the smuggling was over. Following this view the High Court held that the intent necessary for a conviction under section 167 (81) of the Act could not be attributed to a person who acquires possession of smuggled goods or deals with them long after the smuggling was over and who was not the smuggler himself or was not concerned in the smuggling in any manner. The High Court further held that it was only the person who was concerned in the transaction of smuggling in any manner who would either have the intent to defraud the Government of the duty payable or have the intent to evade any prohibition or restriction imposed on importation. As it was not shown in these cases that the two respondents were smugglers or were in any way concerned with the actual smuggling, the High Court ordered their acquittal and did not go into other points urged on behalf of the respondents against the judgment of the Presidency Magistrate by which they had been convicted under section 167 (81) of the Act. We have held in *Sita Ram Agarwala's case*<sup>2</sup>, that section 167 (81) applies not only to a person who might be concerned in smuggling but also to a person who deals with smuggled goods after the smuggling is over and that such a person also has the intent to avoid the prohibition or restriction or defraud the Government of the duty payable thereon provided he has the knowledge that the goods were smuggled. In this view of the matter the basis on which the High Court acquitted the respondents falls. We therefore allow the appeals, set aside the order of the High Court and remand the cases to the High Court for dealing with the other points raised on behalf of the respondents against their conviction in accordance with law and in the light of this judgment.

V.S.

*Appeals Nos. 192 of 1961 and 183 of 1962 allowed.*

*Appeal No. 123 of 1962 dismissed;  
Appeals Nos. 41 and 42 of 1964  
allowed cases remanded to the High  
Court of Bombay.*

1. A.I.R. 1962 Cal. 370.

2. Cr. A. 192 of 1961.

## THE SUPREME COURT OF INDIA

PRESENT.—K. SUBBA RAO, V. RAMASWAMI AND J. M. SHELAT, JJ

Harinagar Sugar Mills Co., Ltd., Bombay

.. Appellant\*

v

M. W. Pradhan (Now G. V. Dalvi), Court Receiver, High Court,  
Bombay

Respondent.

*Companies Act (I of 1956), sections 433 (e), 434 (1) (a) and 439 (1) (b)—Civil Procedure Code (V of 1908)—Order 40, rule 1—Petition for winding up of a company—Company indebted to a joint Hindu family—Receiver appointed by Court in a suit for partition of the properties of the joint family—Empowered to take necessary proceedings to realise the properties and debts due to the family—If can file a petition for winding up—Statutory notice to pay the debt to Assistant Collector, Bombay in discharge of income-tax due by the family—If proper and sufficient—Non-compliance amounts to 'neglect to pay' the debt—Petition unsustainable—Income tax Act (XI of 1922) section 46*

The appellant-company was indebted to the joint family of one Narayanlal Bansal (who was also the chairman of the company) to the extent of Rs. 25,00,000. In a suit O.S. No. 224 of 1961 on the file of the Bombay High Court filed by one of the sons of the said Narayanlal against him and others the Court appointed a Receiver in respect of all the family properties. The Receiver (Pradhan) issued a notice under section 434 of the Companies Act (I of 1956) calling upon the company (the debtor) to pay the said amount due with interest to the Additional Collector, Bombay, towards the income-tax dues of the joint family, also informing it, that in case the amount is not paid within 21 days of the receipt of the notice proceedings for winding up of the company will be taken. The company failed to comply with the notice. The Receiver moved the High Court for directions and got an order authorising him to file a petition for winding up. He filed the petition and it was admitted after hearing the objections of the company. The appeal against the order admitting the petition was dismissed. Against the order of dismissal this appeal by Special Leave was preferred to the Supreme Court.

The contentions of the appellant-company were (i) The Court Receiver has no power to file the petition for winding up (ii) he is not a 'creditor' under the relevant sections of the Companies Act, (iii) the notice issued by the Receiver was not in strict compliance of section 434 of the Act in that it did not direct the payment to him or the joint family and it deprived the appellant of the opportunity of compounding the claim with the creditor, (iv) the company had not neglected to pay, and (v) there was a *bona fide* dispute as to the liability and therefore the petition could not be admitted.

*Held* the petition for winding up is a mode (though not the normal mode) of realisation of the debts due by the company to the joint family. Property does not affect the power but only its exercise. It follows that in terms of clause (d) of rule 1 of Order 40 Civil Procedure Code a Receiver can file a petition for winding up for realisation of the properties, including debts of which he was appointed the Receiver.

That apart, under that rule 1, the Court can also confer on the Receiver such of the powers as the Court may deem fit. The Receiver was authorised to file, the petition for winding up by the direction and order of the Court. So he had the power to file the petition.

A Receiver authorised to file suits to recover debts could institute suits in his own name. The position of such a Receiver is analogous to that of a Receiver who can file an action in law or equity to recover a debt under the English law. There is no reason to hold that a Receiver empowered to file a suit under Order 40 Civil Procedure Code cannot be a creditor within the meaning of section 433 (1) (b) of the Companies Act. Further the expression by 'assignment or otherwise' in section 434 of the Act takes in any person to whom another becomes indebted howsoever the relationship of debtor and creditor is brought about between them. If the debtor pays to the Receiver he gets a full discharge. The respondent is a creditor within the meaning of sections 434 (1) (e) and 439 (1) (4) of the Companies Act and therefore competent to present the petition for winding up of the company.

The Receiver in directing the amount to be paid to the Additional Collector, Bombay did not do anything in derogation of the provisions of section 434 (1) (e) of Act (I of 1956). Section

434 (1) (a) of the Act does not say that the demand made by the creditor on the company shall be to pay the amount due only to the creditor and not to any other person, nor does it by necessary implication impose any such condition.

The statutory notice issued by the respondent cannot be held to violate any of the requirements of section 434 (1) (a). The debtor was not asked thereby to do something which was prohibited but only to comply with the Collector's requisition under section 46 of the Income-tax Act. By not doing so the company clearly neglected to pay within the meaning of section 434 of the Companies Act.

Section 434 (1) (a) confers no right on the debtor but only gives him an opportunity to discharge the debt in one or the other of the ways mentioned therein. Where, as in this case, the debtor and creditor are under an obligation to discharge the income-tax dues and the creditors has directed the payment of the entire amount due towards the same there is no scope for the debtor to approach the creditor for securing or compounding the claim.

That apart, if the company compounds the claim with the Receiver it will be binding on both. The Income-tax Officer might even then collect the amount attached by exercising his powers under section 46 (2) of the Income-tax Act ; but that does not prevent the appellant from compounding with the Receiver.

*Held on facts*, the alleged dispute as to the liability to the joint family was not *bona fide* but was only a part of a scheme of collusion between the Company and the *karta* Narayanlal.

Appeal by Special Leave from the Judgment and Order, dated the 14th December, 1964, of the Bombay High Court in Appeal No. 67 of 1964.

*N. C. Chatterjee* and *S. T. Desai*, Senior Advocates (*M.M. Vakil*, Advocate and *Ganpat Rai* and *S. S. Khanduja*, Advocates of *M/s. Ganpat Rai & Co.*, with them), for Appellant.

*S.V. Gupte*, Solicitor-General of India (*J. B. Dadachanji*, *O. C. Mathur* and *Ravinder Narain*, Advocates of *M/s. J. B. Dadachanji & Co.*, with him), for Respondent.

The Judgment of the Court was delivered by

*Subba Rao, J.*—The facts that gave rise to this appeal may be briefly stated : On 3rd January, 1933, Messrs. Harinagar Sugar Mills, Ltd. hereinafter called the Company, was incorporated under the Indian Companies Act, 1913 (VII of 1913). Narayanlal Bansilal was the Chairman of the Board of Directors of the Company. He was also the *karta* and manager of the joint Hindu family consisting of himself, his sons and daughters. As such *karta* he purchased a large block of shares of the Company from and out of the funds of the joint family. The said family also owned a sugarcane farm at Harinagar in the State of Bihar. On 8th March, 1956, Narayanlal Bansilal and his three sons sold the said farm to the Company for a sum of Rs. 40,00,000. Under the sale-deed the Company agreed to pay the price in instalments. Though the Company paid a few instalments, a sum of Rs. 25,00,000 still remained to be paid by it to the joint family. In July, 1961, one of the sons of Narayanlal Bansilal filed Suit No. 224 of 1961 on the Original Side of the Bombay High Court against his father and others for partition of the joint family properties. Pending the suit, on 20th October, 1961, the Court in exercise of its powers under O. 40, rule 7, of the Code of Civil Procedure, appointed a Court Receiver as Receiver of all the joint family properties. Long prior to the filing of the said suit for partition on 24th July, 1956, the Additional Income-tax Officer Section V, Central Bombay, issued a notice to the Company under section 46 of the Indian Income-tax Act, 1922, prohibiting it from paying the debt due by it to the joint family and calling upon it to pay the said amount to the Income-tax authorities towards income-tax due from the said joint family. After the Receiver was appointed on 29th June, 1962, the said Receiver issued a notice under section 434 of the Indian Companies Act calling upon the Company to pay the amount due from it to the joint family with interest to the Additional Collector of Bombay towards the income-tax dues of the family and also informing it that, in case the said payment was not made within 21 days of the receipt of the notice, proceedings for winding up of the Company under the Indian Companies Act would be taken. As the Company did not comply with the terms of the said notice, the Receiver moved the High Court for

directions and obtained an order on 22nd November, 1963, authorizing him to file a petition for winding up of the Company. After obtaining the permission of the Court, on 10th January, 1964, the Receiver filed a petition in the High Court for winding up of the Company. After hearing the objections filed by the Company, Kantawala, J. admitted the petition and directed advertisements to be given in the newspapers and in the Government Gazette mentioning his order. The Company preferred an appeal against that order and that was heard by a Division Bench consisting of Patel and Tulzapurkar, JJ. The learned Judges dismissed the appeal. Hence the present appeal, by Special Leave.

Mr N. C. Chatterjee, learned Counsel for the appellant-company, raises before us the same contentions which were advanced unsuccessfully on behalf of the Company in the High Court. We shall deal with the said contentions *seriatim*.

The first Contention of the learned Counsel is that the Court Receiver had no power to file a petition in the Court for winding up of the Company. Elaborating this contention the learned Counsel contends that under Order 40, rule 1 (d) of the Code of Civil Procedure a Court can only confer on a Receiver the power to bring a suit and that the expression "suit" does not take in a petition for winding up of a company.

Order 40, rule 1 of the Code of Civil Procedure reads—

"Where it appears to the Court to be just and convenient the Court may by order—

• • • • •

(d) confer upon the receiver all such powers, as to bringing and defending suits and for the realisation, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has or such of those powers as the Court thinks fit."

In exercise of the said power the Court appointed the respondent as the Court Receiver on 20th October, 1961, of the properties belonging to the joint family in the suit. The material part of the order reads—

"It is further ordered that the Court Receiver be and he is hereby appointed receiver of the properties belonging to the joint family in suit and all the books of accounts, papers and vouchers with all necessary powers under Order 40 rule 1 of the Code of Civil Procedure including power to vote and, or exercise all the property rights in respect of shares belonging to the joint family in the several joint stock companies mentioned in the plaint including power to file suit."

Under this order, all the necessary powers under Order 40, rule 1 of the Code of Civil Procedure were conferred upon the Receiver, including the right to file suits. Assuming that a petition for winding up of a company is not a suit within the meaning of Order 40, rule 1 (d) of the said Code, the other powers mentioned therein are comprehensive enough to enable the Receiver to take necessary proceedings to realise the property of and debts due to the joint family. Can it be said that the petition filed by the Receiver for winding up of the Company is not a mode of realisation of the debt due to the joint family from the Company? In Palmer's Company Precedents, Part II, 1960 Edition, at page 25, the following passage appears—

"A winding up petition is a perfectly proper remedy for enforcing payment of a just debt. It is the mode of execution which the Court gives to a creditor against a company unable to pay its debts."

This view is supported by the decisions in *Bowes v Hope Life Insurance and Guarantee Co<sup>1</sup>*, *Re General Company for Promotion of Land Credit<sup>2</sup>* and *Re National Permanent Building Society<sup>3</sup>*. It is true that "a winding up order is not a normal alternative in the case of a company to the ordinary procedure for the realisation of the debts due to it"; but nonetheless it is a form of equitable execution. Propriety does not affect the power but only its exercise. If so it follows that in terms of clause (d) of rule 1 of Order 40 of the Code of Civil Procedure, a Receiver can file a petition for winding up of a company for the realisation of the properties movable and immovable including debts of which he was appointed the Receiver. In this view,

1 (1945) 11 H.L.C. 385

2 (1970) L.R. 5 Ch. D. 372.

3 (1869) L.R. 5 Ch. D. 309

the respondent had power to file the petition in the Court for winding up of the Company.

That apart, under Order 40, rule 1 (d) of the Code of Civil Procedure the Court can also confer on the Receiver such of those powers as the Court thinks fit. It is implicit in this apparently wide power that it shall be confined to the scope of the receiver's administration of the estate. If, for the proper and effective management of the estate of which the Receiver has been appointed the Court thinks fit that it shall confer power on the said Receiver to take steps for winding up of the debtor company, it must be conceded that the Court will have power to give necessary directions to the Receiver in that regard.

On 22nd November, 1963, the Receiver obtained the directions of the Court empowering him to file the winding-up petition against the Company. But, it is contended that the learned Judge made that order without prejudice to the contentions of the members of the joint family and that one of the contentions was that a petition for the winding up of the Company was not maintainable at the instance of the Receiver. This reservation, no doubt, entitles the appellant to raise the plea of the maintainability of the petition filed by the Receiver for winding up of the Company. But it does not bear on the question of authorization obtained by the Receiver to file the said petition. The question of the maintainability of the petition will be dealt with by us at a later stage of the judgment. In this view also the Receiver had the power to file the petition before the Court for winding up of the Company. There are, therefore no merits in the first contention.

The second contention of the learned Counsel is that the Court Receiver is not a "creditor" within the meaning of the relevant sections of the Indian Companies Act. The relevant provisions of the Indian Companies Act read :

Section 433.—A company may be wound up by the Court,—

\* \* \* \* \*

(e) if the company is unable to pay its debts.

Section 434 .—(1) A company shall be deemed to be unable to pay its debts—

(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred rupees then due, has served on the company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor.

Section 439.—(1) An application to the Court for the winding up of a company shall be by petition presented, subject to the provisions of this section,—

(b) by any creditor or creditors, including any contingent or prospective creditor or creditors.

A combined reading of these provisions indicates that unless the Court Receiver is a creditor by assignment or otherwise to whom the company is indebted, he cannot maintain an application under section 439 of the Indian Companies Act. In support of the contention that he is not such a creditor, strong reliance is placed on the decision in *In re Sacker, ex parte Sacker*<sup>1</sup>. The facts of that case, as given in the head-note are as follows : In an action in the Chancery Division a receiver was appointed to collect and receive goods comprised in a charge given to the plaintiffs by one of the defendants, including therein any balance of the proceeds of the goods so charged in the hands of the other defendant. An order was subsequently made for the payment by the last-mentioned defendant to the receiver of a specific sum, being money received by him in respect of the proceeds of the goods, and comprised in the charge. The Court of Appeal held that the receiver was not a "creditor" entitled to present a bankruptcy petition against such defendant within the meaning of section 6 of the Bankruptcy Act, 1883. Lord Esher, M.R., in coming to the said conclusion described the legal status of a receiver thus :

"The petitioner is a receiver. He is not a trustee. There is no debt due to him from the appellant. He could not sue for this sum of money in his own name either at law or in equity. Even if he could by the authority of the Court sue for it in his own name, is the money due to him per-

sonally either at law or in equity? At law it is certainly not. The debt was due to another person for whom he is not a trustee. The money will not be his when he has got it. Would it be his in equity? I apprehend that he would hold it subject to the authority of the Court who would deal with it according to the circumstances of the case, but certainly not for his benefit<sup>1</sup>.

Fry, L.J., said much to the same effect thus:

"There is no debt of any kind due from Sacker to the receiver, consequently he is not a good petitioning creditor, and the petition cannot be maintained."

Lopes, L.J., expressed the same idea thus:

"To constitute a good petitioning creditor a debt the alleged debt must be certainly due and payable to the person who presents the petition. There is no debt due to this receiver. He could not maintain an action of debt for this money in his own name."

This decision, therefore, goes to the extent of holding that there is no debt due to a receiver either at law or in equity, that he cannot maintain an action of debt for the money in his own name and that, therefore, he is not a good petitioning creditor. The scope of this decision was explained by the Court of Appeal in *In re Macoun*<sup>2</sup>. There, on the dissolution of a firm of stock brokers by the death of one of the partners the partnership assets, including a debt to the late firm in respect of certain Stock Exchange transactions, were assigned by the surviving partners to L for the purpose of winding up the partnership and notice of the assignment was served on the debtor. L obtained a decree against the debtor. Thereafter, he commenced an action in the Chancery Division for the winding up of the partnership, and in that action a receiver was appointed of the partnership assets. The receiver took an assignment of the judgment debt from L, and obtained leave to issue execution. Thereafter he served a bankruptcy notice on the debtor and ultimately presented a bankruptcy petition against the debtor. The Court of Appeal held that, as the receiver had obtained an assignment of the judgment debt, he was a creditor entitled to present a bankruptcy petition. In the context, when the judgment in *In re Sacker's case*<sup>3</sup> was pressed upon the Court to come to a contrary conclusion, Vaughan Williams, L.J., had this to say in regard to that judgment:

"In these circumstances it seems to me that we ought not to hold the case of *In re Sacker*<sup>4</sup>, to be an authority for the proposition that a receiver cannot be a good petitioning creditor even though the state of things is such that he could maintain an action at law. It is plain that Fry L.J., thought that he could, and Lopes L.J., seems to have taken the same view—that is, the view that if the receiver were the holder of a bill of exchange he could be a good petitioning creditor. In the present case the receiver happens to be the assignee of a judgment and I think that being the assignee of a judgment he can be a good petitioning creditor even though when the money is received it is recovered for the purpose of enabling the Court of Chancery to deal with it."

A comparison of these two decisions leads to the following legal position. If a receiver could maintain an action at law or in equity for the recovery of a debt, he would be a good petitioning creditor, and, if he could not, he would not be one. In *In re Sacker's case*<sup>5</sup>, it was not possible for the receiver to bring an action to recover the debt either at law or in equity, whereas in *Macoun's case*<sup>6</sup>, the receiver, having obtained the assignment of the debt, could maintain an action at law for the recovery of the debt. Therefore, even in England a receiver, who can maintain an action to recover a debt, would be a good petitioning creditor. In India, the scope of the receiver's power is governed by the express provisions of the Code of Civil Procedure. It is common place that a receiver appointed by Court has no estate or interest himself and the scope of his power is defined by the provisions of Order 40 of the said Code and the specific orders made by the Court thereunder. He is frequently spoken of as the "hand of the Court". In exercise of the power under the said clause (d) if a Court confers upon the receiver power to bring a suit to realise the assets which are the subject matter of the suit, it cannot be denied that the said receiver can file suits to recover the debts forming part of the said assets. Thus Court in *A. V. Mallaya v T. Ramaswami & Co*<sup>7</sup>, held that a receiver authorized to file suits to recover debts could institute suits therefore in his own name. In that event, the position of such a receiver is analogous to that of a receiver who can file an action in

1. L.R. (1904) 2 K.B. 700, 703.

2. (1893) L.R. 22 Q.B. 179, 183, 185, 186.

3. (1963) 2 S.C.J. 483. (1963) 2 A.W.R. (S.C.) 110. (1963) 2 M.L.J. (S.C.) 110.

law or in equity to recover a debt under the English law. If the latter is a creditor in English law in respect of the debt recoverable by him, there is no reason why a receiver empowered to file a suit under Order 40 of the Code of Civil Procedure cannot be a creditor. In one case there is a voluntary assignment and in the other there is a statutory assignment.

The relevant provisions of the Indian Companies Act also lead to the same position. Section 434 speaks of a creditor by assignment or otherwise to whom the company is indebted in a particular sum. Such creditor can file a petition for winding up under section 439 of the said Act. A creditor, therefore, under the Indian Companies Act is any person who acquires that character by assignment or otherwise. The expression "otherwise" takes in any person to whom another becomes indebted howsoever the relationship of creditor and debtor is brought about between them. We came back to the meaning of the word "creditor." Stroud's Judicial Dictionary, 3rd Edition, Volume I, defines "creditor" to mean a person to whom a debt is payable. Though this is one of the many definitions given in the said dictionary, this appears to be the appropriate meaning. A receiver appointed by the Court to realise a debt can demand the payment of the debt. If the debtor pays the debt to him, he gets a full discharge; in default of payment the receiver can file a suit in his own name and obtain a decree. After obtaining the decree he will certainly be a judgment-creditor. Such a receiver is a person to whom a debt is payable by the debtor. In the present case, the respondent was authorised to file suits to realise the assets of the joint family, including the debt. We hold that the respondent is a creditor within the meaning of section 439 (1) (b) of the Indian Companies Act and, therefore, is competent to maintain the petition for winding up of the Company.

It is then contended that the notice issued by the Receiver was not in strict compliance with the statutory requirements of section 434 of the Indian Companies Act. Two main defects are pointed out, namely, the notice did not require the appellant to pay the debt to the joint family or the Receiver but to the Additional Collector of Bombay and the said notice put it beyond the reach of the Company to secure or compound for the debt to the reasonable satisfaction of the Court Receiver. Section 434 of the Indian Companies Act has been quoted earlier. Under the section before a company shall be deemed to be unable to pay its debts two conditions must be satisfied, namely, (i) the creditor shall have delivered a demand in the prescribed manner on the company to pay the sum due to him; and (ii) the company has for three weeks thereafter neglected to pay the same, or to secure or compound for it to the reasonable satisfaction of the creditor. We have already held that the Receiver is a creditor within the meaning of clause (a) of section 434 (1) of the Indian Companies Act. In the statutory notice issued by the Receiver he had called upon the Company to make payment of Rs. 25,00,000 to the Additional Collector of Bombay by whom the debt had been attached within the prescribed period of 21 days. He had to do so because the Additional Collector had served a notice, dated 24th July, 1956, under section 46 (5) (a) of the Indian Income-tax Act, 1922, calling upon the Company to pay to him whatever amount was held by the Company on account of the joint family. Section 434 (1) (a) of the Indian Companies Act does not say that the demand made by the creditor on the Company shall be to pay the amount due only to the creditor and not to any other person; nor does it by necessary implication impose any such condition. What is necessary is that the debtor by paying the amount demanded shall be in a position to get full discharge of his liability. In the present case the Receiver directed the amount to be paid to the Additional Collector of Bombay for the purpose of liquidating the income-tax payable by the joint family. Indeed, by paying the said amount, and in view of the notice served on the Company under section 46 (5) (a) of the Indian Income-tax Act, 1922, the Company will get a full discharge of its liability to the joint family. Section 46 (5) (a) of the Income-tax Act says that any person making any payment in compliance with a notice under section 46 (5) (a) shall be deemed to have made the payment under the authority of the assessee and the receipt of the Income-tax Officer shall constitute a good and sufficient discharge of the liability of such person to the assessee. The Receiver, therefore, in directing the amount to be paid to the Additional Collector of Bombay did not do



anything in derogation of the provisions of section 434 (1) (o) of the Indian Companies Act

Nor are there any merits in the second link of the contention. The question is whether if proceedings were taken against the Company under section 46 (5) (a) of the Indian Income tax Act the Company was deprived of the opportunity to pay the sum due to the respondent or to secure or compound for it to the reasonable satisfaction of the creditor within the meaning of section 434 (1) (o) of the Indian Companies Act. After the statutory notice the Company could pay the sum demanded or secure or compound for it to the reasonable satisfaction of the creditor. The section does not confer a right on a debtor but only gives him an opportunity to discharge the debt in one or other of the ways mentioned therein. The debtor could secure or compound for a debt only where the circumstances under which the demand is made permit such a mode of discharge. But whereas in this case both the debtor and the creditor were under an obligation to discharge the income tax dues and as the creditor directed the debtor to pay the entire amount due to him towards the income tax dues there is no scope for the debtor to approach the creditor for securing or compounding his claim. In this view no right of the Company is violated as it has none under section 434 (1) (o) of the Indian Companies Act. That apart section 46 (5) (o) of the Indian Income tax Act does not in terms prevent the debtor from compounding his claim with the creditor. It only directs him to hold the money for or on account of the assessee to pay to the Income tax Officer. But if in contravention of the notice issued to him the debtor pays the said money to the creditor, he will be personally liable to the extent of the liability discharged or to the extent of the tax and penalties whichever is less. The Income tax Officer can also proceed against the debtor, as if the amount in respect whereof the notice was issued was attached by the Collector in exercise of his powers under the proviso to sub-section (2) of section 46 of the Indian Income tax Act. These provisions do not prevent the debtor from compounding his claim with the creditor. If he compounds the claim any agreement entered into by him with the creditor will not affect his liability to pay the income-tax of the creditor to the extent covered by the notice issued under section 46 (5) (a) of the Income tax Act, but the agreement would certainly be binding between the creditor and the debtor. The Income-tax Officer has no concern with it. In either view, therefore the notice cannot be said to have been issued in contravention of the provisions of section 434 (1) (o) of the Indian Companies Act. No doubt Courts have held in our view rightly that a statutory notice under section 434 (1) (a) of the Indian Companies Act shall strictly comply with the provisions of the said section see *Japan Cotton Trading Co. Ltd v Jafodia Cotton Mills Ltd*<sup>1</sup>, *Kureshi v Argus Footwear Ltd*<sup>2</sup> and *WT Henleys Telegraph Works Co., Ltd. Calcutta v Gorakhpur Electric Supply Co. Ltd Allahabad*<sup>3</sup>. But in this case the statutory notice issued by the respondent did not violate any of the requirements of the section. We, therefore reject this contention.

The next contention is that the appellant had not neglected to pay the sum to the respondent as the said amount must be deemed to have been attached by the Collector in exercise of his powers under the proviso to sub-section (2) of section 46 of the Indian Income tax Act 1922. In support of this contention reliance is placed upon *In re European Banking Company ex parte Baylis*<sup>4</sup>. There a petition was presented for winding up of a Banking Company for a debt of 65 pounds due to the petitioner but the said debt was attached in the Lord Mayor's Court. The petition was dismissed on the ground that though the attachment did not absolutely do away with the debt it seized the debt into the hands of the Lord Mayor's Court. In that case the demand was that the debtor should pay the amount to the petitioning creditor and because of the attachment of that amount by Lord Mayor's Court the debtor could not pay the amount to the creditor. But that judgment cannot possibly be of any help to the appellant for in the instant case the Receiver asked the debtor to pay the amount due to the joint family to the Additional Collector, Bombay

1 (19 6) I.L.R. 54 Cal 345  
2 A.L.R. 1931 Rang. 306.

3 A.I.R. 1936 All 840  
4 (1966) L.R. 2 Eq 521

towards, the income-tax due from the joint family. The debtor was not asked to do something which was legally prohibited but was asked to comply with the Collector's requisition under section 46 of the Indian Income-tax Act, 1922. By not doing so, the Company clearly neglected to pay the amount within the meaning of section 434 of the Indian Companies Act.

Lastly, it is argued that there was a *bona fide* dispute in respect of the liability of the Company to the joint family. It is said that the Company's case was that the debt was due to four individuals mentioned in the conveyance, namely, the father and his three sons, whereas the Receiver's case was that the amount was due to the jointly family and, therefore, in the circumstances it cannot be said that the Company neglected to pay the amount to the Receiver. In *W. T. Henley's Telegraph Works Co., Ltd., Calcutta v. Gorakhpur Electric Supply Co., Ltd., Allahabad*<sup>1</sup>, it was ruled that a mere service of notice of demand of debt by a creditor on a solvent company did not entitle the creditor to a winding-up order if the company *bona fide* disputed the existence of the debt. In that case it was found that there was a *bona fide* dispute between the parties and that the notice issued was a vehicle of oppression and an abuse of the process of the Court. But the same cannot be said in the present case. In *re Gold Hill Mines*<sup>2</sup>, also a winding-up petition was dismissed on the finding that it was an abuse of the process of the Court, it being a petition to compel payment of a small debt which was under *bona fide* dispute.

In the present case, Narayanlal Bansilal was not only the *karta* of the joint family but was also the Chairman of the Board of Directors of the Company. In the partition suit he filed an affidavit wherein he stated:

"Referring to para. 10 (c) of the affidavit I deny there is any manipulation in the balance-sheet of Harinagar Sugar Mills, Ltd. as falsely sought to be suggested by the 3rd defendant. No loan of Rs 25,00,000 has been given by me to the said company. The said amount is the balance of the purchase price payable by the said company to the joint family in respect of Harinagar Cane Farm."

In view of the said affidavit it is manifest that the alleged dispute was not *bona fide* but was only a part of a scheme of collusion, between the Company and the *karta* of the joint family. There are therefore, no merits in any of the contentions raised by the Company.

In the result, the appeal fails and is dismissed with costs.

K. G. S.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, Chief Justice, K. N. WANCHOO, M. HIDAYATULLAH, J. C. SHAH AND S. M. SIKRI, JJ.

Ratan Lal

*Appellant\**

v.

State of Maharashtra

*Respondent.*

*Bombay Prohibition Act (XXV of 1949), sections 6-A (as amended by Act XXII of 1960), 24-A and 59-A—Medicinal preparations (Mahadrakhasava and Dashmoolarishta alcohol content above 50 per cent by volume)—Manufacture by distillation process by a licensed person and issue from a bonded warehouse—Possession (on 14th September, 1960), if offends the statute—Exemption under section 24-A (2)—Applicability,—Subsequent declaration (on 4th October, 1960) under section 6-A if effective.*

Under section 6-A (as amended by Act XXII of 1960) there is only one mode of proof by the State that a medicinal preparation containing alcohol is fit for use as intoxicating liquor and that is by obtaining the advice of the Board of Experts and recording its determination, that the article

<sup>1</sup> A.I.R. 1956 All. 840.

<sup>2</sup> (1883) L.R. 23 Ch.D. 210.

\* Cr. A. No. 53 of 1964.

8th October, 1965.

is fit for consumption as intoxicating liquor (sub-section 6) Until it is determined the medicinal preparation is to be deemed unfit for use as intoxicating liquor under section 24-A (2)

If the medicinal preparations contained alcohol produced by distillation (as stated by the Sub-Inspector of Prohibition and Excise) the proviso to section 59-A will have no application, there must be proof that the preparations contained alcohol in excess of the quantity permissible under the first paragraph of section 59-A to attract the provisions of the proviso to section 24-A.

In the instant case there was clear evidence on record (i) that the medicinal preparations seized were manufactured by a process of distillation (ii) there is no evidence on record that they contained alcohol in excess of the quantity permissible under para. 1 of section 59-A, (iii) that on the date of seizure (14th September 1960) those articles had not been declared under section 6-A to be fit for use as intoxicating liquor

*Held*, on the above facts —The High Court has lost sight of the change in section 6-A of the Act and had followed the decision in *Narandas Mangal's Case*, (1962) 2 S.C.J. 54 (1962) M.L.J. (Cr.) 649, the effect of sub-section (7) of section 6-A has not been noticed.

The medicinal preparations seized from the possession of the appellant must on that date be deemed to be unfit for use as intoxicating liquor and that it answered the description and limitations in section 59-A and hence their possession on that date was not an offence by virtue of the provision of section 24-A.

A subsequent declaration (on 4th October 1960) by the State Government under section 6-A that the said preparation were medicines fit for use as intoxicating liquor could not have retrospective operation and possession which was innocent before could not be declared as offending the statute.

Appeal by Special Leave from the Judgment and Order, dated the 9th August, 1963, of the Bombay High Court (Nagpur Bench) in Criminal Revision Application No 107 of 1963

*B Sen*, Senior Advocate (*J B Dadachanj*, *O C. Mathur* and *Ravinder Narain*, Advocates of *M/s J B Dadachanj & Co*, with him), for Appellant

*P K Chatterjee* and *B R G K Achar*, Advocates, for Respondent.

The Judgment of the Court was delivered by

*Shah, J*—*Ratan Lal*—appellant in this appeal—is the proprietor of a business in drugs styled “Anil Medical Stores” at Wani, District Yeotmal in the State of Maharashtra. On 14th September, 1960, the Station House Officer, Wani, raided the shop of the appellant and seized 12 bottles of an Ayurvedic preparation called *Mahadrakshasava* manufactured by the Brahma Aushadhalaya, Nagpur and 88 bottles of *Dashmooolarutha* manufactured by the Vedic Pharmaceutical Works, Nagpur. At a trial held before the Magistrate, First Class, Kelapur, the appellant was convicted of the offence punishable under section 66 (1) (b) of the Bombay Prohibition Act XXV of 1949, and was sentenced to suffer rigorous imprisonment for three months and to pay a fine of Rs 500. The order was confirmed in appeal by the Court of Session, Yeotmal. The High Court of Bombay confirmed the conviction, but modified the sentence. The appellant appeals to this Court, with Special Leave.

The following are the material facts found by the Trial Court and confirmed by the Court of Appeal and the High Court. *Mahadrakshasava* and *Dashmooolarutha* are Ayurvedic medicinal preparations containing alcohol manufactured under licences granted under the Medicinal and Toilet Preparations (Excise Duties) Act XVI of 1955. *Mahadrakshasava* attached from the shop of the appellant contained 52.3 per cent alcohol v/v and *Dashmooolarutha* contained 54.5 per cent alcohol v/v. These preparations are manufactured by a process of distillation. The appellant had purchased these preparations from a drug store in Nagpur called the Sharda Medical Stores who in their turn were supplied by the manufacturers the Brahma Aushadhalaya Nagpur and the Vedic Pharmaceutical Works, Nagpur.

The Bombay Prohibition Act XXV of 1949 by section 66 (1) (b) penalises contravention of the provisions of the Act or of any rule, regulation, or order made, or of any licence, permit, pass or authorization issued thereunder by any person who consumes, uses, possesses or transports any intoxicant other than opium or hemp.

"Intoxicant" is defined by section 2 (22) as meaning any liquor, intoxicating drug, opium, or any other substance, which the State Government may, by notification in the Official Gazette declare to be an intoxicant. "Liquor" is defined in section 2 (24) as including (a) spirits, denatured spirits, wine, beer, toddy and all liquids consisting of or containing alcohol; (b) any other intoxicating substance which the State Government may, by notification in the Official Gazette, declare to be liquor for the purposes of the Act. Section 12 of the Act, in so far as it is material provides that no person shall import, export, transport or possess liquor. But these prohibitions are subject to certain exceptions. By section 11 notwithstanding anything contained in the provisions contained in Chapter III (which includes sections 11 to 24-A) it is lawful to import, export, transport, manufacture, sell, buy, possess, use or consume any intoxicant to the extent provided by the provisions of the Act or any rules, regulations or orders made or in accordance with the terms and conditions of a licence, permit, pass or authorization granted thereunder. The prohibitions are also inapplicable in respect of certain preparations under section 24-A which provides in so far as it is material :

"Nothing in this Chapter shall be deemed to apply to—

- (1) Any toilet preparation containing alcohol which is unfit for use as intoxicating liquor ;
- (2) any medicinal preparation containing alcohol which is unfit for use as intoxicating liquor ;
- (3) any antiseptic preparation or solution containing alcohol which is unfit for use as intoxicating liquor ;
- (4) any flavouring extract, essence or syrup containing alcohol which is unfit for use as intoxicating liquor ;

Provided that such article corresponds with the description and limitation mentioned in section 59-A."

Possession of a toilet, medicinal or antiseptic preparation, or flavouring article containing alcohol is therefore not an offence if it is unfit for use as an intoxicating liquor, and it corresponds with the description and limitations mentioned in section 59-A.

The appellant did at the material time possess preparations which contained a large percentage of alcohol, and it is not the case of the appellant that he was protected by a licence, permit, pass or authorization. His case was that possession of the preparations by him was not in contravention of the Act, because the preparations were medicinal preparations containing alcohol which were unfit for use as as intoxicating liquor within the meaning of section 24-A of the Act. This contention of the appellant has been uniformly rejected by all the Courts below. The question which falls to be determined in this appeal is whether the preparations containing alcohol in respect of which the appellant is convicted were medicinal preparations which were unfit for use as intoxicating liquor. That the preparations were medicinal according to the Ayurvedic system is not denied, and it is common ground that they contain alcohol. Attention must therefore be directed to ascertain whether the preparations did correspond with the description and limitations mentioned in section 59-A. If they did not, exemption under section 24-A will be inoperative, even if they are medicinal preparations. In so far as it is material, section 59-A which was added by Act XXVI of 1952 at the relevant time provided :

"(1) No manufacturer of any of the articles mentioned in section 24-A shall sell, use or dispose of any liquor purchased or possessed for the purposes of such manufacture under the provisions of this Act otherwise than as an ingredient of the article authorised to be manufactured therefrom. No more alcohol shall be used in the manufacture of any of the articles mentioned in section 24-A than the quantity necessary for extraction or solution of the elements contained therein and for the preservation of the articles ;

Provided that in the case of manufacture of any of the articles mentioned in section 24-A in which the alcohol is generated by a process of fermentation the amount of such alcohol shall not exceed 12 per cent by volume.

(2)

Sub-section (1) directs the manufacturer not to use in the manufacture of any article mentioned in section 24-A alcohol in excess of the quantity necessary for

extraction or solution of the elements and for preservation of the article, and the proviso states that in the manufacture of articles in which alcohol is generated by a process of fermentation it shall not exceed 12 per cent by volume. Therefore the quantity of alcohol in an article in which alcohol is added or produced by distillation is determined by what is necessary for extraction or solution of the elements and preservation of the articles but in an article containing alcohol generated by process of fermentation the percentage of alcohol, it is directed, shall not exceed 12 per cent by volume.

The Trial Court held that the offending articles were Ayurvedic preparations in which alcohol was generated by a process of fermentation and as alcohol exceeded 12 per cent by volume, the preparations did not correspond with the limitations prescribed by section 59-A, and therefore the exemption prescribed by section 24-A was inoperative. The Court of Session and the High Court agreed with that view. But it appears that in so holding the Courts misconceived the evidence. Articles containing alcohol may be prepared by a process of fermentation which generates alcohol or by a process of distillation or by addition of free alcohol. The manufacturing processes which result in distillation of alcohol and generation of alcohol by fermentation are distinct, and there was on the record clear evidence that the offending preparations were manufactured by a process of distillation and were not preparations in which alcohol was generated by fermentation. Palnitkar Sub-Inspector of Prohibition and Excise said that *Mahadrakshasara* and *Dashmoolarishta* are distilled Ayurvedic products. Apparently it was conceded on behalf of the State before the Court of Session that the two preparations were Ayurvedic medicinal preparations which contained alcohol produced by distillation<sup>1</sup> and before the High Court also the case was argued on that footing. If the bottles of *Mahadrakshasara* and *Dashmoolarishta* attached from the shop of the appellant contained alcohol produced by distillation the proviso to section 59-A will have no application. There is no evidence on the record to prove that the two preparations contained alcohol in excess of the quantity permissible under the first paragraph of section 59-A. It must be remembered that these preparations were manufactured within the State of Maharashtra by manufacturers licensed under the Medicinal and Toilet Preparations (Excise Duties) Act, XVI of 1925 and were issued from a bonded warehouse. This would justify the inference that they did correspond with the description and limitations mentioned in section 59-A.

But it was urged for the State that a medicinal preparation which corresponds with the description and limitations under section 59-A may still be a preparation which is fit to be used as intoxicating liquor. A medicinal preparation which because of the high percentage of alcohol therein even if taken in an ordinary or normal dose, may intoxicate a normal person would be a preparation fit to be used as an intoxicating liquor. Where the preparation contains a small percentage of alcohol but consumption of large quantities may intoxicate it would also be regarded as a preparation fit for use as intoxicating liquor if such consumption is not likely to involve any deleterious effect or serious danger to health of the consumer.

Whether a preparation is fit to be used as intoxicating liquor would ordinarily depend upon evidence. But the Legislature has by section 6-A prescribed special rules of evidence in adjudging whether an article is unfit for use as intoxicating liquor. Section 6-A was added by Bombay Act XXVI of 1922 after this Court declared in *State of Bombay v. F. N. Balsara*<sup>1</sup> amongst others that clause (c) of section 12, in so far as it affected possession of medicinal and toilet preparations containing alcohol is invalid. As originally enacted section 6-A in so far as it is material was in the following form:

(1) For the purpose of determining whether

(a) any medicinal or toilet preparation containing alcohol, or

(b) any antiseptic preparation or solution containing alcohol, or

1 (1951) S.C.J. 478 (1951) 2 M.L.J. 111 (1951) S.C.R. 682.

(c) any flavouring extract, essence or syrup containing alcohol, is or is not an article unfit for use as intoxicating liquor, the State Government shall constitute a Board of Experts.

(2)	*	*	*	*	*	*
(3)	*	*	*	*	*	*
(4)	*	*	*	*	*	*
(5)	*	*	*	*	*	*

(6) It shall be the duty of the Board to advise the State Government on the question whether any article mentioned in sub-section (1) containing alcohol is unfit for use as intoxicating liquor and on such other matters incidental to the said question as may be referred to it by the State Government. On obtaining such advice the State Government shall determine whether any such article is fit or unfit for use as intoxicating liquor or not and such article shall be presumed accordingly to be fit or unfit for use as intoxicating liquor, until the contrary is proved."

This Court held in *State of Bombay (now Gujarat) v. Narandas Mangilal Agarwal and another*<sup>1</sup>, that it was not obligatory upon the State to consult the Board of Experts constituted under section 6-A before the State could establish in a prosecution for an offence under section 66 (1) (b) that a medicinal preparation was unfit for use as intoxicating liquor. Evidence that the preparation was unfit for use as intoxicating liquor can be adduced before the Court, and the prosecution need not rely upon section 6-A (6) of the Act : in a prosecution for infringement of the prohibition contained in sections 12 and 13, the State could rely upon the presumption after resorting to the machinery under section 6-A (6), but there was no obligation to consult the Board under section 6-A, nor was the consultation a condition precedent to the institution of proceeding for breach of the provisions of the Act. In so holding, this Court disagreed with the view expressed by the Bombay High Court in *D. K. Merchant v. State of Bombay*<sup>2</sup>, wherein the High Court had held that the prosecution for offence under sections 65 and 66 could not be maintained unless the State Government was satisfied after consulting the Board of Experts under section 6-A that the article was fit to be used as intoxicating liquor. The offence in *Narandas Mangilal's case*<sup>1</sup>, was committed in July, 1955 and on the terms of sub-section (6) as it then stood it was open to the State in a prosecution for infringement of a prohibition contained in sections 12 and 13 to rely upon the presumption under section 6-A or to establish that the medicinal preparation was fit for use as intoxicating liquor *aliunde*. By Act XXII of 1960, which was brought into force on 20th April, 1960, the Bombay Legislature amended, *inter alia*, sub-section (6) of section 6-A, and incorporated sub-section (7) therein. Sub-sections (6) and (7) as amended and incorporated read as follows :

"(6) It shall be the duty of the Board to advise the State Government on the question whether any article mentioned in sub-section (1) is fit for use as intoxicating liquor and also on any matters incidental to the question, referred to it by the State Government. On obtaining such advice, the State Government shall determine whether any such article is fit for use as intoxicating liquor, and upon determination of the State Government that it is so fit, such article shall, until the contrary is proved, be presumed to be fit for use as intoxicating liquor.

(7) Until the State Government has determined as aforesaid any article mentioned in sub-section (1) to be fit for use as intoxicating liquor, every such article shall be deemed to be unfit for such use."

The scheme of section 6-A has by the amending Act been completely altered. The Legislature has prescribed by sub-section (7) that until the State Government has determined any article mentioned in sub-section (1) to be fit for use as intoxicating liquor, every such article shall be deemed to be unfit for such use. The Legislature has therefore prescribed a fiction which continues to function till the State Government has determined, on the report of the Board of Experts, that any article mentioned in sub-section (1) is fit for use as intoxicating liquor. By sub-section (6) as amended it is provided that after the State Government has obtained the advice of the Board of Experts, the State Government shall determine whether such article is fit for use as intoxicating liquor and upon such deter-

1 (1962) 2 S.C.J. 542 : (1962) (Supp.) 1 2. (1958) 60 Bom.L.R. 1183 : I.L.R. (1958) S.C.R. 15 : (1962) M.L.J. (Cr.) 649. Bom. 1224.

mination of the State Government that it is so fit, such article shall, until the contrary is proved, be presumed to be fit for use as intoxicating liquor. Under the amended section 6-A there is only one mode of proof by the State that an article is fit for use as intoxicating liquor, and that is by obtaining the advice of the Board of Experts and recording its determination, that the article is fit for use as intoxicating liquor. Until it is otherwise determined by the State, after obtaining the report of the Board of Experts, every article mentioned in sub-section (1) is to be deemed unfit for use as intoxicating liquor. After it is determined as fit for use as intoxicating liquor, in a proceeding relating to the article it would under sub-section (6) be presumed, that it is fit for use as intoxicating liquor. But the presumption is rebuttable.

In the present case the offence is alleged to have been committed in September, 1960. After consulting the Board of Experts the Government of Maharashtra issued a declaration on 4th October, 1960, declaring that both the preparations *Mahadrak shasava* and *Dashmoolarishta* were medicines fit for use as intoxicating liquor. Thereafter a Police Report was filed in the Court of the Magistrate, First Class, on 2nd June, 1962 charging the appellant with the offence under section 65 (1) (b) of the Bombay Prohibition Act. But on the date on which the medicinal preparations were attached the statute had provided that they shall be deemed for the purpose of the Act as articles unfit for use as intoxicating liquor. Possession of the medicinal preparations which were unfit for use as intoxicating liquor was at the date when they were attached, not an offence. A subsequent declaration by the State that they were fit for use as intoxicating liquor, could not have any retrospective operation, and possession which was innocent could not by subsequent act of the State, be declared as offending the statute.

It is unfortunate that the High Court lost sight of the change in the scheme of section 6-A and followed the judgment of this Court in *Narandas Mangilal's case*<sup>1</sup>. In *Narandas Mangilal's case*<sup>1</sup>, at all material times when the question fell to be considered the Court had to decide whether sub-section (6) of section 6-A as it then stood, prescribed the only method of proof whether an offending medicinal preparation was unfit for use as intoxicating liquor, and thus Court on the phraseology used by the Legislature came to the conclusion that it was not the only method of proof. But the incorporation of sub-section (7) by the Legislature has altered the scheme of the Act. Sub-section (6) incorporated in its second part both before and after the amendment, a rule of evidence, but the rule in sub-section (7), that until a declaration is made to the contrary by the State Government under sub-section (6) every article mentioned in sub-section (1) shall be deemed unfit for use as intoxicating liquor, is not a rule of evidence. It defines for the purpose of section 24-A and related sections what an article unfit for use as an intoxicating liquor is. It is plain that in *Narandas Mangilal's case*<sup>1</sup>, the effect of sub-section (7) of section 6-A did not fall to be considered.

The appellant was therefore wrongly convicted. The appeal is allowed and the order of conviction and sentence are set aside. The fine if paid will be refunded.

K. G. S.

*Appeal allowed, conviction and sentence set aside*

## THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, M. Hidayatullah and V. Ramaswami, JJ.

Gurcharan Das Chadha

.. Petitioner\*

v.

State of Rajasthan

.. Respondent.

*Criminal Procedure Code (V of 1898), section 527 and Criminal Law Amendment Act (XLVI of 1952), sections 6, 7 and 8—Case pending before the Special Judge under the Act of 1952—Petition in Supreme Court for transfer to Court of equal jurisdiction under High Court of another State—Jurisdiction—No inconsistency between section 527 of Code and section 7 (2) of Act of 1952—Transfer of case—Ground of reasonable apprehension of denial of justice, essential—General feeling of hostility of persons, insufficient—Likely interference with course of justice to be made out—Practice—Question of inherent jurisdiction—To be tried first before dealing on merits.*

*Contempt of Court—Trial of a member of All India Services before the Special Judge—Pending petition in Supreme Court for transfer—Departmental proceedings for contravention of (Conduct) Rules prohibiting disclosure of official documents and information—Charge of disclosure to his advocates of the member in regard to writ proceedings in High Court—Likely to amount to obstruction of administration of justice and putting person under duress—Contempt—Action of State deprecated.*

The petitioner, a member of an All India Service, in a petition under section 527 of the Code of Criminal Procedure, sought the transfer of the criminal case pending in the Court of the Special Judge for offences under sections 120-B/161 of the Indian Penal Code and sections 5 (1) (a), (d) and 5 (2) of the Prevention of Corruption Act, to another criminal Court of equal jurisdiction, in another State. While the petition was pending, the State Government issued to him a notice why he should not be proceeded against breach of Rule No. 8 of the All India Services (Conduct) Rules, 1954, for communicating to his advocates official documents and information (which he was not authorised to do), in respect of a writ petition that he filed in the High Court before approaching the Supreme Court. On the question of the jurisdiction of the Supreme Court in the matter of transfer under section 527 of the Code and on the contempt application.

*Held*, the Supreme Court in exercise of its jurisdiction and power under section 527 of the Code of Criminal Procedure, can transfer a case from a Special Judge appointed under the Criminal Law Amendment Act of 1952 and functioning under one High Court to another Special Judge subordinate to another High Court.

Section 7 (1) of the Criminal Amendment Act lays down that the trial of an offence specified in sub-section (1) of section 6 must be by a Special Judge only but that condition can be fully met by transferring the case to another Special Judge.

Section 8 (3) of the Criminal Law Amendment Act preserves the application of any provision of the Code of Criminal Procedure if it is not inconsistent with the Act of 1952, save as provided in the first two sub-sections of that section. There is no inconsistency between section 527 of the Code and section 7 (2) of the Act of 1952. Inconsistency can only be found if two provisions of law apply in identical circumstances and create contradictions. Section 7 (2) of the Act of 1952 distributes the work between Special Judges and lays emphasis on the fact that trial must be before a Special Judge appointed for the area in which the offence is committed. This is on a par with the distribution of work territorially between different Sessions Judges and Magistrates. An order of transfer must, by the very nature of things some times result in taking the case out of the territory and the provisions of the Code which are preserved by section 8 (3) must supervene to enable this to be done and section 7 (2) of the Act of 1952 must yield. This does not create an inconsistency because the territorial jurisdiction created by section 7 (2) of the Act of 1952 operates in a different sphere and under different circumstances.

The law with regard to transfer of cases is that a case is transferred if there is a reasonable apprehension on the part of a party to a case that justice will not be done. A petitioner is not required to demonstrate justice will inevitably fail. He is entitled to a transfer if he shows circumstances from which it can be inferred that he entertains an apprehension and that it is reasonable in the circum-



tances alleged. However a mere allegation that there is apprehension that justice will not be done in a given case does not suffice.

A general feeling that some persons are hostile to the petitioner is not sufficient. There must be material from which it can be inferred that the persons who are hostile are interfering or are likely to interfere either directly or indirectly with course of justice.

Questions of inherent jurisdiction must always be decided before the merits are considered because to dismiss the petition after consideration of merits itself involves an assumption of jurisdiction.

In accepting the apology tendered on behalf of the State, the Court observed:

There could be no question in the instant case that by charging the petitioner with proceedings of a different kind there was if not direct at least indirect pressure brought upon him in the prosecution of his petition for transfer. Of this the Supreme Court would have taken serious note because it was likely to have hampered the petitioner in prosecuting his petition freely before the Court and would have resulted in obstruction of administration of justice. If the petitioner was guilty of any lapse under the Services (Conduct) Rules or even guilty of an offence the action to which he would be otherwise subject could wait till the transfer proceedings had terminated and there was really no hurry with a charge against the petitioner which charge would have put him under duress of some kind. Such a course of action is to be deprecated.

Petition under section 527 of Criminal Procedure Code

*T. R. Bhasin*, Advocate, for Petitioner

*G. C. Kashwal*, Advocate General for the State of Rajasthan *K. K. Jain* and *R. A. Sachthy*, Advocates, with him, for Respondent

The Judgment of the Court was delivered by

*Hidayatullah, J.*—This is a petition under section 527 of the Code of Criminal Procedure for the transfer of a criminal case (No. 2 of 1964—*State v. Gurcharan Dass Chadha, IPS*) which is pending in the Court of the Special Judge, Bharatpur, Rajasthan to another criminal Court of equal or superior jurisdiction subordinate to a High Court other than the High Court of Rajasthan. The petitioner is the accused in that case and he is being tried under sections 120B-161, Indian Penal Code and sections 5 (1) (a) (d) and 5 (2) of the Prevention of Corruption Act.

The petitioner is a member of an All India Service and his prosecution has been sanctioned by the Government of India. In December, 1962, he was serving as Superintendent of Police and was selected to be Commandant of 8th Battalion of Rajasthan Armed Constabulary. He avers that he took over as Commandant on 7th January, 1963, but was placed under suspension the same day and a case was registered on 12th January, 1963, which has resulted in the present prosecution against him. The petitioner apprehends for reasons to be stated presently that he is not likely to get a fair, just and impartial trial in the State of Rajasthan owing to the hostility and influence of the then Law Minister who was also Minister in-charge of Home Department of the State, the Additional Inspector-General of Police, Anti-Corruption, and the Deputy Inspector-General of Police, Ajmer Range, Jaipur. In support of his petition he has referred to many incidents and filed many documents. He has sworn an affidavit that he entertains an apprehension that these persons would interfere with the trial of the case in the State of Rajasthan and that a transfer of the case outside the State is in the interest of justice.

The State Government has opposed the application strenuously and has questioned the jurisdiction of this Court of transfer under the powers conferred on it by section 527, Code of Criminal Procedure a case made over by the Government of the State of Rajasthan for trial to a Special Judge under the Criminal Law Amendment Act, 1952 (XLVI of 1952). In addition, the State Government joins issue on the facts alleged and the merits of the claim for the transfer of the case.

While this petition was pending the State Government served the petitioner with a notice and a charge sheet to show cause why he should not be proceeded against for breach of Rule 8 of the All India Services (Conduct) Rules, 1954 because he had communicated "directly/indirectly official documents and information to Government servants other persons to whom he was not authorised to

communicate such documents/information" as indicated and detailed in a statement of allegations accompanying the notice and the charge. The State Government has appended to this charge to appendices giving details of 31 and 16 documents respectively, which were said to have been so communicated by the petitioner to his Counsel Messrs. R.K. Rastogi and D.P. Gupta, Advocates of Jodhpur and others named as "non-petitioners" in a writ petition which he had filed in the High Court of Rajasthan (No. 794 of 1964) and which he subsequently withdrew on 23rd December, 1964, before taking action to file the present petition. The notice, the charge and the statement of allegations accompanying them were signed by Mr. Vishnu Dutt Sharma, Special Secretary to Government. On receiving this charge, the petitioner moved another petition in this Court for taking action against Mr. Sharma and the Government of Rajasthan for contempt of this Court. At an earlier hearing, where we were considering the petition for transfer, the other petition was brought to our notice and we were about to order issuance of notices to the contemnors but the Advocate-General of the Government of Rajasthan took notice of the petition and offered to take action in respect thereof. As a result the State of Rajasthan through the Chief Secretary to the Government and Mr. Sharma separately filed their replies to the second petition and attempted justification. Mr. Sharma abjured knowledge of the contents of the petition for transfer and denied any malice, ill-will or grudge, pleading good faith. The matter would have received serious attention from us but for the fact that at the next hearing the plea for justification was abandoned and an unconditional apology was entered on behalf of the State Government as well as Mr. Sharma. The latter was present in Court and expressed regret for what had happened. We accepted the apology and do not, therefore, feel called upon to consider the plea of justification which, in any event, is not a plea heard in bar when contempt is clear and manifest. There could be no question in the present case that by charging the petitioner with proceedings of a different kind there was, if not direct, at least indirect pressure brought upon him in the prosecution of his petition for transfer. Of this we would have taken serious note because it was likely to have hampered the petitioner in prosecuting his petition freely before this Court and would have resulted in obstruction of administration of justice. If the petitioner was guilty of any lapse under the Services (Conduct) Rules or even guilty of an offence the action to which he would be otherwise subject could wait till the present proceedings had terminated and there was really no reason to hurry with a charge against the petitioner which charge would have put him under duress of some kind. Such a course of action is to be deprecated and we are glad to note that the Government of Rajasthan and the Secretary concerned have seen the matter in this light and have made amends by proper contrition. We do not feel called upon to say more than this on the petition for contempt which shall be filed.

We shall now take up the objection that this Court lacks jurisdiction to transfer the case pending before the Special Judge, Bharatpur. This objection goes to the root of the matter. Questions of inherent jurisdiction must always be decided before the merits are considered because to dismiss the petition after consideration of merits itself involves an assumption of jurisdiction. We must accordingly consider the objection even though we are satisfied that the petition must fail on merits.

The power which the petitioner is invoking flows from section 527 of the Code of Criminal Procedure. The first two sub-sections of that section are material here and they read :

"527. *Power of Supreme Court to transfer cases and appeals.*—(1) Whenever it is made to appear to the Supreme Court that an order under this section is expedient for the ends of justice, it may direct that any particular case or appeal be transferred from one High Court to another. High Court or from a Criminal Court subordinate to one High Court to another Criminal Court of equal or superior jurisdiction subordinate to another High Court.

(2) The Supreme Court may act under this section only on the application of the Attorney-General of India or of a party interested, and every such application shall be made by motion which shall, except when the applicant is the Attorney-General of India or the Advocate-General, be supported by affidavit or affirmation.

It is conceded by the Advocate-General that the power to transfer criminal cases as laid down in the section is ordinarily available but he contends that a case assigned by the State Government under the Criminal Law Amendment Act, 1952 to a Special Judge cannot be transferred at all because under the terms of that Act, which is a self-contained special law, such a case must be tried by the Special Judge designate only. The argument is extremely plausible but does not bear close scrutiny. To understand the argument and how it is refuted certain provisions of the Act may be seen. The first section of the Act gives the short title of the Act. Sections 2 and 3 of the Act introduce changes in the Indian Penal Code by increasing the punishment in section 165 and by inserting section 165-A which provides for punishment for abetment of offences defined in sections 161 and 165. Sections 4 and 5 of the Act make some amendments in section 161 of the Indian Penal Code and section 337 of the Code of Criminal Procedure. These four sections have been repealed by the Repealing and Amending Act, 1957 as they were no longer necessary. The sections which we have to consider are sections 6, 7 and 8 of the Act. Section 6 confers power on the State Government to appoint Special Judges for the trial of certain offences. The parts relevant to our purpose read :

"6. *Power to appoint special judges*.—(1) The State Government may, by notification in the Official Gazette, appoint as many special judges as may be necessary for such area, or areas as may be specified in the notification to try the following offences, namely :—

(a) an offence punishable under section 161, section 162, section 163, section 164, section 165, or section 165-A of the Indian Penal Code (XLV of 1860), or sub-section (2) of section 5 of the Prevention of Corruption Act, 1947 (II of 1947),

(b) any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in clause (a).

Section 7 next provides what cases shall be tried by Special Judges. The first two sub-sections read :

"7. *Cases triable by Special Judges*.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (V of 1898) or in any other law the offences specified in sub-section (1) of section 6 shall be triable by special judges only.

(2) Every offence specified in sub-section (1) of section 6 shall be tried by the Special Judge for the area within which it was committed, or where there are more Special Judges than one for such area, by such one of them as may be specified in this behalf by the State Government."

The procedure which the Special Judge has to follow is laid down in section 8 (1) and by sub-section (2) of the same section certain powers are conferred on the special Judge. Sub-section (3) then provides :

"8. *Procedure and Powers of Special Judges*.—

(1) " " " " " " "

(2) " " " " " " "

(3) Save as provided in sub-section (1) or sub-section (2), the provisions of the Code of Criminal Procedure, 1898, shall so far as they are not inconsistent with this Act, apply to the proceedings before a Special Judge; and for the purposes of the said provisions, the Court of the Special Judge shall be deemed to be a Court of Session trying cases without a jury or without the aid of assessors and the person conducting a prosecution before a Special Judge shall be deemed to be a public prosecutor

" " " " " " "

There is no need to refer to other provisions of the Act which do not bear upon this matter.

The Advocate-General, Rajasthan in opposing the petition relies principally on the provisions of section 7 (1) and (2) and contends that the two sub-sections create two restrictions which must be read together. The first is that offences specified in section 6 (1) can be tried by special Judges only. The second is that every such offence shall be tried by the Special Judge for the the area within which it is committed and if there are more Special Judges in that area, by the Special Judge chosen by Government. These two conditions, being statutory, it is submitted no order

can be made under section 527 because on transfer, even if a Special Judge is entrusted with the case, the second condition is bound to be broken.

No doubt sub-section (1) of section 7 lays down that the trial of an offence specified in sub-section (1) of section 6 must be by a special Judge only but that condition can be fully met by transferring the case to another Special Judge. Indeed section 527 itself contemplates that the transfer should be to a Court of equal or superior jurisdiction and we presume that there are Special Judges in every State of India. The selection of a Special Judge causes no difficulty. It is the second condition which is really pleaded in bar. The provision of sub-section (2) of section 7 is that an offence shall be tried by the Special Judge for the area within which it is committed.

This condition, if literally understood would lead to the conclusion that a case once made over to a Special Judge in an area where there is no other Special Judge, cannot be transferred at all. This could hardly have been intended. If this were so, the power to transfer a case intra-state under section 526 of the Code of Criminal Procedure, on a parity of reasoning, must also be lacking. But this Court in *Ramachandra Prasad v. State of Bihar*<sup>1</sup>, upheld the transfer of a case by the High Court which took it to a Special Judge who had no jurisdiction in the area where the offence was committed. In holding that the transfer was valid this Court relied upon the third sub-section of section 8 of the Act. That sub-section preserves the application of any provision of the Code of Criminal Procedure if it is not inconsistent with the Act, save as provided in the first two sub-sections of that section. The question, therefore, resolves itself to this : is there an inconsistency between section 527 of the Code and the second sub-section of section 7 ? The answer is that there is none. Apparently this Court in the earlier case found no inconsistency and the reasons appear to be these : The condition that an offence specified in section 6 (2) shall be tried by a Special Judge for the area within which it is committed merely specifies which of several special Judges appointed in the State by the State Government shall try it. The provision is analogous to others under which the jurisdiction of Magistrates and Sessions Judges is determined on a territorial basis. Enactments in the Code of Criminal Procedure intended to confer territorial jurisdiction upon Courts and Presiding Officers have never been held to stand in the way of transfer of criminal cases outside those areas of territorial jurisdiction. The order of transfer when it is made under the powers given by the Code invests another officer with jurisdiction although ordinarily he would lack territorial jurisdiction to try the case. The order of this Court, therefore, which transfers a case from one Special Judge subordinate to one High Court to another Special Judge subordinate to another High Court creates jurisdiction in the latter in much the same way as the transfer by the High Court from one Sessions Judge in a Session Division to another Sessions Judge in another Session Division.

There is no comparison between the first sub-section and the second sub-section of section 7. The condition in the second sub-section of section 7 is not of the same character as the condition in the first sub-section. The first sub-section creates a condition which is a *sine qua non* for the trial of certain offences. That condition is that the trial must be before a Special Judge. The second sub-section distributes the work between Special Judges and lays emphasis on the fact that trial must be before a Special Judge appointed for the area in which the offence is committed. This second condition is on par with the distribution of work territorially between different Sessions Judges and Magistrates. An order of transfer must by the very nature of things some times result in taking the case out of the territory and the provisions of the Code which are preserved by the third sub-section of section 8 must supervene to enable this to be done and the second sub-section of section 7 must yield. We do not consider that this creates any inconsistency because the territorial jurisdiction created by the second sub-section of section 7 operates in a different sphere and under different circumstances. Inconsistency can only be found if two provisions of law apply in identical circumstances and create contradictions. Such

a situation does not arise when either this Court or the High Court exercises its powers of transfer. We are accordingly of the opinion that the Supreme Court in exercise of its jurisdiction and power under section 527 of the Code of Criminal Procedure can transfer a case from a Special Judge subordinate to one High Court to another Special Judge subordinate to another High Court.

This brings us to the question of the merits of the petition. The petitioner is being prosecuted for offences under section 120-B/161 of the Indian Penal Code and sections 5 (1) (a) (d) and 5 (2) of the Prevention of Corruption Act. His apprehension is that the case against him is the result of the machination of two police officers and one Mr Mathura Dass Mathur who was the Home Minister in 1962. He also alleges hostility on the part of the State Government. He has given instances which in his opinion prove that the above two officers, the Home Minister and the State Government are hostile to him. In relation to the State Government he has alleged that when he was appointed Commandant of the 8th Battalion of Rajasthan Armed Constabulary the State Government downgraded his post otherwise he would have received a higher starting pay. He also alleges that his suspension and prosecution were made to coincide with his assumption of new duties so that he might not be able to join his new post.

With regard to the Home Minister he has given five instances in which he apparently crossed the minister's path and gave him room for annoyance. In regard to the two Police Officers he has averred that the Deputy Inspector General of Police, Ajmer Range (Hanuman Prasad Sharma) and he had some differences on three occasions. He has also given similar instances of hostility towards him entertained by Sultan Singh, Deputy Inspector General of Police. On the basis of these he says that he entertains an apprehension that he will not receive justice in the State of Rajasthan. The law with regard to transfer of cases is well settled. A case is transferred if there is a reasonable apprehension on the part of a party to a case that justice will not be done. A petitioner is not required to demonstrate that justice will inevitably fail. He is entitled to a transfer if he shows circumstances from which it can be inferred that he entertains an apprehension and that it is reasonable in the circumstances alleged. It is one of the principles of the administration of justice that justice should not only be done but it should be seen to be done. However, a mere allegation that there is apprehension that justice will not be done in a given case does not suffice. The Court has further to see whether the apprehension is reasonable or not. To judge of the reasonableness of the apprehension the state of the mind of the person who entertains the apprehension is no doubt relevant but that is not all. The apprehension must not only be entertained but must appear to the Court to be a reasonable apprehension.

Applying these principles it may be said that there is a possibility that the petitioner entertains an apprehension that certain persons are hostile to him but his apprehension that he will not receive justice in the State of Rajasthan is not in our opinion reasonable. All the facts which he has narrated bear upon past events in his official life. Nothing has been said which will show that there is in any manner an interference direct or indirect with the investigation of the offences alleged against him or the trial of the case before the Special Judge, Bharatpur. A general feeling that some persons are hostile to the petitioner is not sufficient. There must be material from which it can be inferred that the persons who are so hostile are interfering or are likely to interfere either directly or indirectly with the course of justice. Of this there is no trace either in his petition or in the arguments which were advanced before us. Nor does the petitioner allege anything against the Special Judge who is trying the case. In the view of the matter we decline to order transfer of the case from the Special Judge, Bharatpur. The petition accordingly fails and will be dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, M. HIDAYATULLAH, J. C. SHAH AND S. M. SIKRI, JJ.

Kaluram Onkarmal and another

.. Appellants<sup>4</sup>

v.

Baidyanath Gorain

.. Respondent.

*West Bengal Premises Tenancy Act (XII of 1956), sections 17 and 22—Deposit before Controller under section 22 after filing of suit —If sufficient to bar applicability of section 17 (3).*

Section 22 (3) of the West Bengal Premises Tenancy Act, 1956 does not apply to cases falling under section 17 (1) of the Act. The scheme of section 17 (1) is a complete scheme by itself and the Legislature has intended that in suits or proceedings to which section 17 (1) applies, the payment of rent by the tenant to the landlord must be made in the manner prescribed by section 17 (1). Even in cases where the tenant might have been depositing the rent with the Controller under section 21, he has to comply with section 17 (1) before the period prescribed by section 17 (1) has elapsed. When a suit or proceeding has been commenced between the landlord and tenant for ejectment and the tenant has received notice of it, the payment of rent should be made in Court to avoid any dispute in that behalf.

Desirability of Legislature devising some means of giving relief to tenants who have on the basis of some Calcutta decisions deposited the rents before the Controller even after suits had been filed pointed out.

Majority view in *Sidheswar Paul v. Prakash Chandra Dutta*, A.I.R. 1964 Cal. 105, approved.

Appeal by Special Leave from the Judgment and Order dated 10th April, 1964, of the Calcutta High Court in Civil Rules No. 4439 of 1962.

*N. C. Chatterjee*, Senior Advocate (*D. Goburdhan*, Advocate, with him), for Appellants.

*P. K. Chatterjee* and *D. N. Mukherjee*, Advocates, for Respondent.

The Judgment of the Court was delivered by

*Gajendragadkar, C.J.*—Appellant No. 1 Kaluram Onkarmal, was let into possession of the premises described as holding No. 182-H, G.T. Road, Asansol as a monthly tenant under Harbhajan Singh Wasal who was the owner of the said premises. The rent agreed to be paid was Rs. 35 per month payable according to the English Calendar. It appears that in 1953, the Calcutta National Bank Ltd. (now in liquidation) sued the owner Wasal on the original side of the Calcutta High Court on a mortgage. In the said suit, a preliminary decree was passed and in due course it was followed by a final decree. During the proceedings of the said suit, Mr. K. K. Ghose was appointed Receiver of the mortgaged properties, including the premises in the present suit. On 18th February, 1960, the Receiver put the mortgaged properties to sale and the respondent, Baidyanath Gorain, purchased them. The said sale was confirmed by the Calcutta High Court on 1st March, 1960. That is how the respondent became the owner of the suit premises along with other properties under mortgage. After he acquired title to the suit premises in this manner, the respondent informed Appellant No. 1 about the same by his letter dated the 2nd April, 1960.

On 11th December, 1961, the respondent sued Appellant No. 1 and appellant No. 2 Kaluram Bajranglal in the First Court of the Munsif at Asansol for ejectment. He claimed vacant possession of the premises let out to appellant No. 1 on several grounds. He urged that he reasonably required the premises for rebuilding them after demolishing the existing structure. According to him, the existing structure had become very old and was in a dilapidated condition. He also alleged that appellant No. 1 had unlawfully sublet the suit premises to appellant No. 2, and that he had failed to pay or deposit the rents for the last three years in accordance with law.

The claim for ejectment thus made by the respondent was disputed by appellant No 1 on several grounds. Appellant No 1 denied that the respondent required the suit premises for rebudding, and also disputed his allegation that he had sub-let the said premises unlawfully. In regard to the averment made by the respondent that appellant No 1 had failed to pay or deposit the rents due for the last three years, appellant No 1 made a detailed denial. He urged that the rents had been regularly paid to the owner in time before August, 1960, and he pleaded that since the month of August, 1960 when he found that the owner was not prepared to accept the rents from him, he deposited them with the House Rent Controller, Asansol, from month to month. It was his case that notice had been served on the owner in respect of these deposits from month to month as provided by section 21 (3) of the West Bengal Premises Tenancy Act 1956 (XII of 1956) (hereinafter called 'the Act'). The written statement further averred that the deposit of the monthly rent continued to be made regularly under section 21 and that the rent for March 1962 had been duly deposited on 10th April, 1962. This written statement was filed on 11th April, 1962.

During the pendency of this suit, the respondent made an application under section 17 (3) of the Act and claimed that the defence of appellant No 1 against delivery of possession should be struck out, because he had failed to deposit or pay the amount in Court as required by section 17 (1) of the Act. This application was strenuously opposed by appellant No 1 on the ground that section 17 (3) could not be invoked against him in view of the fact that he had been depositing the rent from month to month under section 21, and he urged that the deposit of rent thus made by him amounted to payment of rent by him to the respondent under section 22 (3) and therefore, no default had been committed by him at all. This dispute raised the question about the true scope and effect of the provisions of section 17 (3) and section 22 (3) of the Act. The learned trial Judge held that notwithstanding the fact that appellant No 1 had been depositing the rent from month to month under section 22 with the Rent Controller, having regard to the provisions contained in section 17 (1) his failure to deposit the relevant amount in Court incurred the liability to have his defence struck out under section 17 (3). In coming to this conclusion, the learned Judge followed a decision of the Division Bench of the Calcutta High Court in *Abdul Majid v. Dr. Saniruddin*<sup>1</sup>. Having held that section 17 (3) applied, the learned Judge directed that the defence raised by appellant No 1 against the claim of the respondent for delivery of possession of the suit premises must be struck out.

This order was challenged by both the appellants by preferring a revision application before the Calcutta High Court. Before this revision application reached the stage of hearing, the question raised by it had already been concluded by a majority decision of the Special Bench of the Calcutta High in *Siddheshwar Paul v. Prakash Chandra Dutta*<sup>2</sup>. The learned single Judge who heard this revision application was naturally bound by the said majority decision, and applying the said decision, he held that the order passed by the learned trial Judge striking out the defence of appellant No 1 under section 17 (3) of the Act was justified. It is this order which is challenged by Mr. N. G. Chatterjee on behalf of the appellants in the present appeal which has been brought to this Court by Special Leave. Mr. Chatterjee contends that the majority decision of the Special Bench in *Siddheshwar Paul's case*<sup>2</sup> is erroneous and has proceeded on a misconstruction of the true scope and effect of the two relevant sections of the Act—sections 17 and 22. That is how the short question which falls for our decision in the present appeal is: what is the true scope and effect of the provisions prescribed by sections 17 and 22 of the Act? It appears that the Special Bench in *Siddheshwar Paul's case*<sup>2</sup> was divided on this issue, the three learned Judges have taken the view that section 22 (3) does not apply to cases falling under section 17 (1) whereas two other learned Judges have come to the conclusion that if a tenant had made a deposit with the Rent Controller to which section 22 (3) applies, section 17 (3) cannot be invoked against him. The separate judgments delivered by all the learned Judges who constituted

the Special Bench have dealt with the point at great length and each one has subjected the said two provisions to a close analysis and examination. In the present appeal, we propose to consider the matter in a broad way and will confine ourselves to some general considerations which flow from the construction of the two relevant provisions and which, in our opinion, support the view taken by the majority of the Judges in the Special Bench.

Before addressing ourselves to the main point in dispute between the parties, it is necessary to refer broadly to the scheme of the Act and its main provisions. The Act was passed in 1956 and it superseded the earlier Act XVII of 1950. The Act consists of seven Chapters. Chapter I deals with definitions; Chapter II contains provisions regarding rent; Chapter III covers suits and proceedings for eviction; Chapter IV has reference to deposit of rent; Chapter V considers the question of appointment of the Controller and other Officers, their powers and functions; Chapter VI provides for appeals, revision and review; and Chapter VII deals with penalties and miscellaneous provisions. Section 2 (b) defines a "Controller"; section 2 (c) defines "fair rent"; section 2 (d) defines a "landlord"; and section 2 (h) defines a "tenant." A tenant, according to section 2 (h) includes any person by whom or on whose account or behalf, the rent of any premises is, or but for a special contract would be, payable and also any person continuing in possession after the termination of his tenancy, but shall not include any person against whom any decree or order for eviction has been made by a Court of competent jurisdiction. Section 4 (1) provides that a tenant shall, subject to the provisions of the Act, pay to the landlord : (a) in cases where fair rent has been fixed for any premises, such rent; (b) in other cases, the rent agreed upon until fair rent is fixed. Section 4 (2) lays down that rent shall be paid within the time fixed by contract or in the absence of such contract by the 15th day of the month next following the month for which it is payable; and under section 4 (3), any sum in excess of the rent referred to in sub-section (1) shall not be recoverable by the landlord. These provisions are in conformity with the pattern which is usually adopted by Rent Restriction Acts. The rest of the provisions of Chapter II deal with the fixation of standard rent; with the said provisions, we are not concerned in the present appeal.

Chapter III which deals with suits and proceedings for eviction contains section 17 which falls to be considered in the present appeal. Section 13 which affords protection to tenants against eviction, lays down that notwithstanding anything to the contrary in any other law, no order or decree for the recovery of possession of any premises shall be made by any Court in favour of the landlord against a tenant except on one or more of the grounds specified by clauses (a) to (k). Amongst these clauses, it is clause (i) which deals with a case where the tenant has made default in the payment of rent for two months within a period of twelve months or for two successive periods in cases where rent is not payable monthly. Section 14 imposes a restriction on subletting. Section 15 prohibits a tenant from receiving any sum or consideration for relinquishment of tenancy; and section 16 provides that the creation and termination of sub-tenancies shall be notified in the manner prescribed by it. That takes us to section 17. Section 17 (1) reads thus :—

"On a suit or proceeding being instituted by the landlord on any of the grounds referred to in section 13, the tenant shall, subject to the provisions of sub-section (2), within one month of the service of the writ of summons on him, deposit in Court or pay to the landlord an amount calculated at the rate of rent at which it was last paid for the period for which the tenant may have made default including the period subsequent thereto up to the end of the month previous to that in which the deposit or payment is made together with interest on such amount calculated at the rate of eight and one-third per cent. per annum from the date when any such amount was payable up to the date of deposit, and shall thereafter continue to deposit or pay, month by month, by the 15th of each succeeding month a sum equivalent to the rent at that rate."

Section 17 (2) deals with cases where there is a dispute as to the amount of rent payable by the tenant. This provision is not relevant for our purpose. Section 17 (3) provides that if a tenant fails to deposit or pay any amount referred to in sub-section (1) or sub-section (2), the Court shall order the defence against delivery of possession to be struck out and shall proceed with the hearing of the suit.



It is under this sub-section that the impugned order has been passed. Section 17 (4) lays down —

\* If a tenant makes deposit or payment as required by sub-section (1) or sub-section (2) no decree or order for delivery of possession of the premises to the landlord on the ground of default in payment of rent by the tenant shall be made by the Court but the Court may allow such costs as it may deem fit to the landlord.

Provided that a tenant shall not be entitled to any relief under this sub-section if he has made default in payment of rent for four months within a period of twelve months."

Reading section 17 (1) by itself, it is clear that when a landlord institutes a suit to recover possession of the premises let to his tenant on any of the grounds referred to in section 13 the tenant is required to deposit the amount in Court as provided by it. It would be noticed that the first part of section 17 (1) enables the tenant who has committed a default in the payment of rent prior to the institution of the suit to make up for that default and pay the defaulted amount as specified by this sub-section. This can be done subject to the condition that the tenant pays interest on the defaulted amount calculated in the manner prescribed by it. In regard to the amount payable in future pending the suit or proceeding section 17 (1) provides that the tenant shall thereafter continue to deposit or pay, month by month, by the 15th of each succeeding month a sum equivalent to the rent at that rate. In the Calcutta High Court there appears to be a difference of opinion as to whether the amount which is required to be deposited by the tenant is rent or not. We are proceeding to deal with the present appeal on the footing that the said amount in law is rent, though it is not described as such by section 17 (1).

It is thus clear that whatever may be the cause on which the landlord's claim for eviction is based section 17 (1) provides that subject to the provisions of sub-section (2), within one month of the service of the writ of summons on him, the tenant is required to deposit in Court the amount in the manner prescribed by it. If he fails to comply with the requirements of section 17 (1), section 17 (3) steps in and enables the landlord to claim that the defence of the tenant against delivery of possession should be struck out. If section 17 (1) and (3) are read by themselves there is no doubt that appellant No. 1 has failed to comply with section 17 (1), and so section 17 (3) can be legitimately invoked against him. He, however, contends that in applying section 17 (3), the Court must take into account not only section 17 (1), but also section 22 (3), and his argument is that if he has deposited the amount of rent under section 21 and the deposit is otherwise valid, then the deposit itself amounts to payment of rent by him to the landlord and as such no order can be passed against him under section 17 (3), because in law, he has not committed a default in the payment of rent at all, and it is this contention which makes it necessary to consider the impact of the provisions of section 22 on the application of section 17 (3) against appellant No. 1.

Let us therefore, read section 22 and attempt to decide what is the effect of section 22 (3) on cases falling under section 17 (1). As we have already pointed out, section 22 occurs in Chapter IV which deals with deposit of rent. This Chapter begins with section 21. Section 21 (1) provides that where the landlord does not accept any rent tendered by the tenant within the time referred to in section 4, or where there is a *bona fide* doubt as to the person or persons to whom the rent is payable the tenant may deposit such rent with the Controller in the prescribed manner. Section 21 (2) lays down that the deposit shall be accompanied by an application which should set forth the particulars prescribed by clauses (a) to (d). Section 21 (3) requires that the said application shall be accompanied by the prescribed number of copies thereof. Section 21 (4) requires the Controller to send a copy of the application received by him from the tenant to the landlord. Under section 21 (5) the Controller is authorised to allow the landlord to withdraw the rent deposited with him. Section 21 (6) empowers the forfeiture of the deposit to Government, subject to the conditions prescribed by clauses (a) and (b) of the said sub-section. There are three other sub-sections to section 21 which are not relevant for our purpose.

That takes us to section 22 ; it reads thus —

“(1) No rent deposited under section 21 shall be considered to have been validly deposited under that section for purposes of clause (i) of sub-section (1) of section 13, unless deposited within fifteen days of the time fixed by the contract in writing for payment of the rent or, in the absence of such contract in writing, unless deposited within the last day of the month following that for which the rent was payable.

(2) No such deposit shall be considered to have been validly made for the purposes of the said clause if the tenant willfully or negligently makes any false statement in his application for depositing the rent, unless the landlord has withdrawn the amount deposited before the date of institution of a suit or proceeding for recovery of possession of the premises from the tenant.

(3) If the rent is deposited within the time mentioned in sub-section (1), and does not cease to be a valid deposit for the reason mentioned in sub-section (2), the deposit shall constitute payment of rent to the landlord as if the amount deposited has been valid legal tender of rent if tendered to the landlord on the date fixed by the contract for payment of rent when there is such a contract, or in the absence of any contract, on the fifteenth day of the month next following that for which rent is payable”.

Mr. N.C. Chatterjee, for the appellants contends that the effect of section 22 (3) is that the deposit made by appellant-No. 1 shall be held to constitute payment by him to the landlord, and so, there can be no scope for invoking section 17 (3) against him inasmuch the basis of section 17 (3), in substance, is that the tenant whose defence is sought to be struck out has committed a default in the payment of rent. The object of section 17 (1) is to secure the payment of rent by the tenant to the landlord, and since that object has been satisfied by the deposit duly made by appellant No. 1 under section 21 (1), it would be unreasonable to allow section 17 (3) to be invoked against him. It is common ground that the deposit of rent has been made by appellant No. 1 in compliance with the provisions of section 21 and that it is not rendered invalid under section 22 (2). In other words, Mr. N.C. Chatterjee is entitled to urge his point on the assumption that appellant No. 1 has made a valid deposit under section 21 and is entitled to the benefit of section 22 (3). Can a valid deposit made under section 21 be permitted to be pleaded by a tenant when an application is made against him under section 17 (3)? that is the question which arises for our decision in the present appeal. The answer to this question necessarily depends upon the determination of the true scope and effect of the provisions contained respectively in section 17 and section 22.

As a matter of common-sense, Mr. N.C. Chatterjee's argument does sound to be *prima facie* attractive. If, in fact appellant No. 1 has deposited the rent from month to month, it does appear harsh and unreasonable that his defence should be struck out on the ground that he has deposited the rent not in the Court where the suit is pending, but with the Controller. When appellant No. 1 began to deposit the rent with the Controller, he was justified in doing so ; but on the other hand, it is urged against him by Mr. P. K. Chatterjee that as soon as the suit is filed under section 17 and the period prescribed by it has expired, it was obligatory on appellant No. 1 to pay the amount in Court and stop depositing it with the Rent Controller; in other words, his failure to pay the amount in Court incurs the penalty prescribed by section 17 (3) notwithstanding the fact that he may have deposited the same amount with the Controller. The requirements of section 17 (1) cannot be said to be satisfied by taking recourse to the provisions of section 22 (3) ; that in substance is the argument for the respondent. The question thus raised for our decision no doubt lies within a very narrow compass and its answer depends upon a proper construction of sections 17 and 22 ; but, as we have already indicated, this narrow question has given rise to a sharp conflict of opinion in the Calcutta High Court. It appears plain that appellant No. 1 finds himself in the present difficult position presumably because, acting upon the view expressed in some of the judgments of the Calcutta High Court, he was advised to deposit the rent with the Controller even after he was sued by the respondent and section 17 (1) began to operate against him.

In dealing with this vexed problem, it is relevant to remember that the two competing provisions occur in two different Chapters and apparently cover different fields. Chapter IV deals with the question of deposit of rent in general, whereas section 17 in Chapter III makes a provision for the payment of the amount mention-

ed by it in Court after a suit or proceeding has been instituted by the landlord against the tenant. It is common ground that the Rent Controller is not Court within the meaning of section 17 (1). *Prima facie* a general provision for the deposit of rent prescribed by section 21 would not apply to special cases dealt with by section 17. The provisions of sections 21 and 22 which are general in character, would cover cases which are not expressly dealt with by the special provision prescribed by section 17. In other words, though a tenant may deposit rent with the Controller under the provisions of sections 21 and 22, as soon as a suit is brought against him by the landlord, section 17 which is a special provision, comes into operation and it is the provision of this special section that must prevail in cases covered by it, that is the first general consideration which cannot be ignored.

Section 17 deals with suits or proceedings in which the landlord claims eviction on any of the grounds referred to in section 13, and as we have already noticed, section 13 which affords protection to the tenants against eviction, permits the landlord to claim eviction only if he can place his claim on one or the other of the clauses (a) to (k), that is to say, it is only if one or the other of the conditions prescribed by the said clauses is proved that the landlord can claim to evict his tenant. Default in the payment of rent is one of these clauses, but there are several other clauses referring to different causes of action on which eviction can be claimed by the landlord, and it is to all these cases that section 17 (1) applies. It is thus clear that normally, when a suit is brought for eviction, the tenant would have to comply with the requirements of section 17 (1). It is only where owing to the refusal of the landlord to accept the rent tendered by the tenant, or where there is a *bona fide* doubt as to who is entitled to receive the rent, that the provisions of section 21 empower the tenant to deposit the rent with the Controller. In all other cases, if the tenant was paying rent to the landlord and is faced with a suit for eviction, section 17 (1) will unambiguously apply and the amount of rent will have to be paid in Court as required by it. It is also clear that if a tenant has been depositing the rent validly and properly under section 21, a suit against him under section 13 (1) (i) cannot be filed. Section 13 (1) (i) authorises the landlord to claim eviction of his tenant on the ground that he has made a default in the payment of rent as described by it. But such a default cannot be attributed to a tenant who has been depositing the rent with the Controller properly and validly under section 21. Such a valid payment amounts to payment of rent by the tenant to the landlord under section 22 (3), and so, a tenant who has been making these deposits cannot be sued under section 13 (1) (i).

It is true that the complication of the present kind arises where a tenant who has been making a valid deposit under section 21 is sued for ejectment on grounds other than section 13 (1) (i), and section 17 (1) comes into operation against him. In such a case, if the special provisions prescribed by section 17 (1) apply to the exclusion of sections 21 and 22, the fact that a deposit has been made by the tenant can be no answer to the application made by the landlord under section 17 (3).

In this connection it is necessary to bear in mind the fact that section 17 (1) is really intended to give a benefit to the tenant who has committed a default in the payment of rent. The first part of section 17 (1) allows such a tenant to pay the defaulted amount of rent together with the prescribed interest in Court within the time prescribed, and such a tenant would not be evicted if he continues to deposit the amount in Court, during the pendency of the suit as required by the latter part of section 17 (1). In our opinion, the scheme of section 17 (1) is a complete scheme by itself and the Legislature has intended that in suits or proceedings to which section 17 (1) applies, the payment of rent by the tenant to the landlord must be made in the manner prescribed by section 17 (1). Even in cases where the tenant might have been depositing the rent with the Controller under section 21, he has to comply with section 17 (1) before the period prescribed by section 17 (1) has elapsed. It is significant that the requirement to deposit the amount in Court comes into force within one month of the service of the writ of summons on the tenant. In other words, appellant No. 1 was justified in depositing the rent even after the present

suit was filed until one month from the service of the writ of summons of the suit had elapsed. The Legislature has taken the precaution of giving the tenant one month's period after the service of the writ of summons on him before requiring him to deposit the amount in Court. The object obviously appears to be that when a suit or proceeding has commenced between the landlord and the tenant for ejectment, and the tenant has received notice of it, the payment of rent should be made in Court to avoid any dispute in that behalf.

It is also relevant to remember that in the matter of payment of rent in Court, section 17 (1) has provided that the amount to be paid in future shall be paid by the 15th of each succeeding month, and that means that the date for the payment of the amount has been statutorily fixed which is distinct from the requirement of section 4. Section 4 (2) provides for the payment of rent within the time fixed by contract, but section 17 (1) requires the payment to be made by the 15th of each succeeding month whatever may be the contract. If, according to the contract, rent was payable quarterly, or sixmonthly, or even annually, section 17 (1) supersedes that part of the contract and requires the rent to be paid, month by month, by the 15th of each succeeding month.

The position under sections 21 and 22 is, however, substantially different on this point. Section 21 (1) in terms requires the deposit to be made within the time referred to in section 4, and that means where there is a contract made by the parties in relation to the time for the payment of rent, it is on the contracted date that the rent has to be deposited under section 21. The scheme of the three clauses of section 22 clearly is integrally connected with section 21. These clauses deal with deposits made under section 21. In fact, it would be difficult to read section 22 (3) independently of section 22 (1) and (2); all the three clauses of section 22 must be read together, and so, the time for making the deposit for the purpose of section 22 (3) would be the time prescribed by contract and not the statutory time provided by section 17 (1). It is clear that the deposit of rent made before the Controller under section 21 is based on the contractual obligation of the tenant to pay the rent, and he makes the deposit because the landlord is not receiving the rent or there is a dispute as to who the real landlord is. On the other hand, the deposit of rent made in Court under section 17 (1) is the result of a statutory obligation imposed by the said sub-section; no doubt, the amount required to be deposited may be the amount for which the parties may have entered into a contract, but the manner and the mode in which the deposit is required to be made in Court are the result of the statutory provision, and in that sense they constitute a statutory obligation. That is another feature which distinguishes the deposits covered by sections 21 and 22 from the deposits prescribed by section 17 (1).

Mr. N.C. Chatterjee argued that if the majority view of the Calcutta High Court is upheld, it may lead to some anomalies. As an illustration, he asked us to consider the case of a suit falling under section 17 (1) which ultimately fails and is dismissed. In such a suit, the rent would have to be deposited in Court by the tenant as required by section 17 (1); but if the suit fails, what happens to the rent? Would the tenant be treated as being a defaulter, or would the tenant who is required to make a deposit in Court as required by section 17 (1) be compelled as a precaution, to make another deposit with the Controller in cases where the landlord had refused to accept rent before he filed the suit? We are not impressed by this argument. In our opinion, if the tenant had deposited the rent in Court as required by section 17 (1), he could not be treated as a defaulter under any provision of the Act. Payment in Court made by the tenant under the statutory obligation imposed on him would, in law, be treated as payment of rent made by him to the landlord.

Mr. N.C. Chatterjee also relies on the fact that section 24 in terms provides that the acceptance of rent in respect of the period of default in payment of rent by the landlord from the tenant shall operate as a waiver of such default, when there is no proceeding pending in Court for the recovery of possession of the premises. The argument is that where the Legislature intended to confine the operation of a

specific provision to cases where there is no proceeding pending in Court, it has expressly so stated. In our opinion, this argument is not well founded. Section 24 merely indicates that the Legislature thought that it was necessary to make that provision in order to avoid any doubt as to whether acceptance of rent would amount to waiver or not in cases where no proceeding was pending in Court. On the other hand, from the wording of section 21 it may be permissible to suggest that the Legislature did not think of providing for the consequence of acceptance of rent after the commencement of a proceeding for the recovery of possession, because it knew that the said matter would be covered by section 17 (1).

Besides, section 22 (2) gives some indication that the provisions of section 22 are not intended to be applied when suits or proceedings have commenced between the landlord and the tenant. It would be noticed that section 22 (2) says that no deposit shall be considered to have been validly made for the purposes of section 22 (1) if the tenant wilfully or negligently makes any false statement in his application for depositing the amount, unless the landlord has withdrawn the amount deposited before the date of institution of a suit or proceeding for recovery of possession of the premises from the tenant. This last clause may suggest that the provisions of all the clauses of section 22 may not be applicable after the suit or proceeding has commenced.

As we have already pointed out, the question raised for our decision in the present appeal really centres round the determination of the areas covered by section 17 on the one hand, and sections 21 and 22 on the other, and though it may be conceded that the words used in the respective sections are not quite clear, on the whole the scheme evidenced by them indicates that the Legislature wanted section 17 (1) to control the relationship between the landlord and the tenant as prescribed by it once a suit or proceeding for ejectment was instituted and a period of one month from the service of the writ of summons on the defendant had expired. We have carefully considered the reasons given by the two learned Judges who delivered the minority judgments in the *Siddheswar Paul's case*<sup>1</sup>, but we have come to the conclusion that the majority view of on the whole correctly represents the true scope and effect of section 17, as distinguished from sections 21 and 22.

In the result, the appeal fails and must be dismissed. There would be no order as to costs.

Before parting with this appeal, however, we would like to add that appellant No. 1 has to submit to the penalty prescribed by section 17 (3) apparently because, acting upon the opinion expressed by some of the learned Judges of the Calcutta High Court, he was advised to continue to deposit the rent with the Controller even after the present suit was filed against him. We do not know whether there are many other cases of the same type. In case there are several other cases of this type, that would really mean unjust hardship against tenants who, in substance, have not committed default in the matter of payment of rent, and yet would be exposed to the risk of ejectment by virtue of the application of section 17 (3). In our opinion, such tenants undoubtedly deserve to be protected against ejectment. We trust the Legislature will consider this matter and devise some means of giving appropriate relief to this class of tenants.

K.S.

*Appeal dismissed*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, M. HIDAYA-TULDAH, J. C. SHAH AND S. M. SIKRI, JJ.

Ajoy Kumar Mukherjee

.. Appellant\*

v.

Local Board of Barpeta

.. Respondents.

*Assam Local Self Government Act (XXV of 1953), section 62—Levy of Annual tax by Local Boards for use of any land for the purpose of holding markets—Constitutionality—Constitution of India (1950), Article 14—If violated.*

If a tax can reasonably be held to be a tax on land it will come within Entry 49 of List II of the Seventh Schedule to the Constitution. It is equally well settled that tax on land may be based on the annual value of the land and would still be a tax on land and would not be beyond the competence of the State Legislature on the ground that it is a tax on income. It follows therefore that the use to which the land is put can be taken into account in imposing a tax on it within the meaning of Entry 49 of List II for the annual value of land which can certainly be taken into account in imposing a tax for the purpose of this entry would necessarily depend upon the use to which the land is put. On its true construction the tax provided by section 62 (2) of the Assam Local Self Government Act is a tax for the use of the land and is not a tax on the market as such, for the income from the market in the shape of tolls, rents and other dues is not liable to tax under section 62 and is different from such tax. The tax in the present case being tax on land and not a tax on markets as such would clearly be within the competence of the State Legislature.

The burden is on the petitioner who attacks the tax as discriminatory and hit by Article 14 of the Constitution, to show that in fixing the tax on the various markets as it did (at various rates within the maximum fixed) the Board acted arbitrarily and did not take into account the size and importance of the markets. But no such facts and figures had been adduced by the petitioner to enable him to sustain the plea that the tax was hit by Article 14 of the Constitution.

Appeal from the Judgment and Order dated 8th June, 1959, of the Assam High Court in Civil Rule No. 42 of 1957.

*D. N. Mukherjee*, for Appellant.

*Naunit Lal*, for Respondent No. 3.

The Judgment of the Court was delivered by

*Wanchoo, J.*—This appeal on a certificate granted by the Assam High Court raises the question of the constitutionality of an annual tax levied by local boards for the use of any land for the purpose of holding markets as provided by section 62 of the Assam Local Self-Government Act XXV of 1953, (hereinafter referred to as the Act). The appellant is a landholder in the district of Kamrup. As such landholder, he holds a hat or market on his land since the year 1936 and this market is known as Kharma hat. In 1953-54, the local board of Barpeta, within whose jurisdiction the Kharma market is held, issued notice to the appellant to take out a licence and pay Rs. 600 for the year 1953-54 as licence-fee for holding the market. Later this sum was increased to Rs. 700 for the year 1955-56. The appellant continued protesting against this levy but no heed was paid to this protests and the amount was sought to be recovered by issue of distress warrants and attachment of his property. Consequently, the appellant filed a Writ Petition in the High Court challenging the constitutionality of the impost on a number of grounds. In the present appeal two main contentions have been urged in support of the appellant's case that the impost is unconstitutional, namely, (i) that the Assam Legislature had no legislative competence to tax markets, and (ii) that the tax actually imposed on the Kharma market infringes Article 14 of the Constitution. We shall therefore consider these two contentions only.

This attack on behalf of the appellant is met by the respondent by relying on Item 49 of List II of the Seventh Schedule to the Constitution, and it is urged that the State Legislature was competent to impose the tax under that entry, for this was a tax on land. As to Article 14, the reply on behalf of the respondent is that under section 62 of the Act, a rule has been framed prescribing Rs. 1,000 as the maximum amount of tax which may be levied by any local board in Assam on markets licensed under that section. The rule also provides that any local board may with the previous approval of Government impose a tax within this maximum according to the size and importance of a market. So it is submitted that the tax has been imposed by Barpeta local board in accordance with this rule and the appellant has failed to show that there has been any discrimination in the fixation of the amount of tax on the Kharma market.

The High Court repelled the contentions raised on behalf of the appellant and dismissed the Writ Petition. As, however, questions of constitutional importance were involved, the High Court granted a certificate under Article 132 of the Constitution, and that is how the matter has come up before us.

The first question which falls for consideration therefore is whether the impost in the present case is a tax on land within the meaning of Entry 49 of List II of the Seventh Schedule to the Constitution. It is well settled that the entries in the three legislative lists have to be interpreted in their widest amplitude and therefore if a tax can reasonably be held to be a tax on land it will come within Entry 49. Further it is equally well settled that tax on land may be based on the annual value of the land and would still be a tax on land and would not be beyond the competence of the State Legislature on the ground that it is tax on income. [See *Ralla Ram v. The Province of East Punjab*<sup>1</sup>] It follows therefore that the use to which the land is put can be taken into account in imposing a tax on it within the meaning of Entry 49 of List II, for the annual value of land which can certainly be taken into account in imposing a tax for the purpose of this entry would necessarily depend upon the use to which the land is put. It is in the light of this settled proposition that we have to examine the scheme of section 62 of the Act, which imposes the tax under challenge.

It is necessary therefore to analyse the scheme of section 62 which provides for this tax. Section 62 (1) *inter alia* lays down that the Local Board may order that no land shall be used as a market otherwise than under a licence to be granted by the Board. Sub-section (2) of section 62 is the charging provision and may be quoted in full:

"On the issue of an order as in sub-section (1) the Board at a meeting may grant within the local limits of its jurisdiction a licence for the use of any land as a market and impose an annual tax thereon and such conditions as prescribed by rules."

Sub-section (3) provides that when it has been determined that a tax shall be imposed under the preceding sub-section, the Local Board shall make an order that the owner of any land used as a market specified in the order shall take out a licence for the purpose. Such order shall specify the tax not exceeding such amount as may be prescribed by rule, which shall be charged for the financial year.

It will be seen from the provisions of these three sub-sections that power of the Board to impose the tax arises on its passing a resolution that no land within its jurisdiction shall be used as a market. Such resolution clearly affects land within the jurisdiction of the Board and on the passing of such a resolution the Board gets the further power to issue licences for holding of markets on lands within its jurisdiction by a resolution and also the power to impose an annual tax thereon. Now it is urged on behalf of the appellant that when sub-section (2) speaks of imposing of "an annual tax thereon" it means the imposition of an annual tax on the market and that there is no provision in List II of the Seventh Schedule for a tax on market and such 'Market and fairs' appear at Item 8 of List II, and it is urged that under

Item 66 of the same list, fees with respect to markets and fairs can be imposed ; but there is no provision for imposing a tax on markets in the Entries from 45 to 63 which deal with taxes. It may be accepted that there is no Entry in List II which provides for taxes as such on markets and fairs. It may also be accepted that Entry 66 will only justify the imposition of fees on markets and fairs which would necessitate the providing of services by the Board imposing the fees as a *quid pro quo*. That however does not conclude the matter, for the contention on behalf of the State is that tax under section 62 is on land and not on the market and further the tax depends upon the use of the land as a market. It seems to us on a close reading of sub-section (2) that when that sub-section speaks of "annual tax thereon", the tax is on the land but the charge arises only when the land is used for a market. This will also be clear from the subsequent provisions of section 62 which show that the tax is on land though its imposition depends upon user of the land as a market. Sub-section (3) shows that as soon as sub-sections (1) and (2) are complied with, the Local Board shall make an order that the owner of any land used as a market shall take out the licence. Thus the tax is on the land and it is the owner of the land who has to take out the licence for its use as a market. The form of the tax i.e. its being an annual tax as contrasted to a tax for each day on which the market is held also shows that in essence the tax is on land and not on the market held thereon. Further the tax is not imposed on any transactions in the market by persons who come there for business which again shows that it is an impost on land and not on the market i.e., on the business therein. Then sub-section (5) provides that the tax shall be paid by the owner of any land used as a market, which again shows that it is on the land that the tax is levied, though the charge arises when it is used as a market. Sub-section (6) then lays down that on receiving the amount so fixed the Board shall issue a licence to the person paying the same. Here again the licence is for the use of the land. Then comes sub-section (8), which provides that whoever, being the owner or occupier of any land uses or permits the same to be used as a market without a licence shall be liable to fine. This provision clearly shows that the tax is on the land and it is the owner or occupier of the land who is responsible and is liable to prosecution if he fails to take out a licence. No liability of any kind is thrown on those who come to the market for the purpose of trade. Sub-section (9) then lays down that where a conviction has been obtained under sub-section (8), the District Magistrate or the Sub-Divisional Officer, as the case may be, may stop the use of the land as a market. Sub-section (10) then provides that every owner, occupier or farmer of a market shall cause such drain to be made therein and take all necessary steps to keep such market in a clean and wholesome state and shall cause supply of sufficient water for the purpose as well as for drinking purpose. Sub-sections (11) and (12) give power to the board on the failure of any owner, occupier or farmer to comply with a notice under sub-section (10), to take possession of the land and the market thereon and execute the works itself and receive all rents, tolls and other dues in respect of the market. This will again show that the tax provided by section 62 (2) is a tax for the use of the land and it is not a tax on the market as such, for the income from the market in the shape of tolls, rents and other dues is not liable to tax under section 62 and is different from such tax. The scheme of section 62 therefore shows that whenever any land is used for the purpose of holding a market, the owner, occupier or farmer of that land has to pay a certain tax for its use as such. But there is no tax on any transaction that may take place within the market. Further the amount of tax depends upon the area of the land on which market is held and the importance of the market subject to a maximum fixed by the State Government. We have therefore no hesitation in coming to the conclusion on a consideration of the scheme of section 62 of the Act that the tax provided therein is a tax on land, though its incidence depends upon the use of the land as a market. Further as we have already indicated section 62 (2) which uses the words "impose an annual tax thereon" clearly shows that the word "thereon" refers to any land for which a licence is issued for use as a market and not to the word "market". Thus the tax in the present case being on land would clearly be within the competence of the State Legislature. The contention of the appellant that the State Legislature was not competent to



impose this tax because there is no provision in List II of the Seventh Schedule for imposing a tax on markets as such must therefore fail

Then we come to the contention under Article 14 of the Constitution. As to that it is well-settled that it is for the person who alleges that equality before law has been infringed to show that such really is the case. It was therefore for the appellant to produce facts and figures from which it can be inferred that the tax imposed in the present case is hit by Article 14 of the Constitution. In that connection, all that the appellant has stated in his Writ Petition is that the Board fixed a high rate arbitrarily and thus discriminated against the appellant's market as against the other neighbouring markets where the tax had been fixed at a much lower rate, and that this was hit by Article 14. There was certainly an allegation by the appellant that Article 14 had been infringed, but that allegation is vague and gives no facts and figures for holding that the tax imposed on the Kharma market was discriminatory. It appears that the tax was imposed for the year 1953-54, which was continued later on, with some modifications. At that time there were five markets on which the tax was imposed including the Kharma market. The lowest tax was at Rs 400 on two markets, then at Rs 500 on the third market and at Rs 600 on the Kharma market and finally at Rs 1,000 on the fifth market.

Rule 300 (2), framed in accordance with section 63 (3) runs thus —

"Rs 1,000 (Rupees one thousand) only per annum has been fixed as the maximum amount of tax which may be levied by the local boards in Assam on markets licensed under section 62 of the Act."

Any Local Board may with the previous approval of Government impose a tax within this maximum according to the size and importance of a market."

Now the rule provides that Rs 1,000 is the maximum tax and within that maximum the Board has to graduate the tax according to the size and importance of the market. The size of the market naturally takes into account the area of the land on which the market is held, the importance of the market depends upon the number of transactions that take place there, for the larger the number of transactions the greater is the importance of the market. If therefore the appellant is to succeed on his plea of Article 14 on the ground that the tax fixed on his market was discriminatory he had to adduce facts and figures, firstly as to the size of the five markets on which the tax was levied in the relevant years and secondly as to the relative importance of these markets. But no such facts and figures have been adduced on behalf of the appellant. It is true that the respondent in reply to the charge of discrimination was equally vague and merely denied that there was any arbitrary discrimination. But it was for the appellant to show that in fixing the tax on the five markets as it did, the Board acted arbitrarily and did not take into account the size and importance of the markets. As there is no material before us by which we can judge the relative size and importance of the five markets, it is not possible to hold that there was discrimination in taxing Kharma market at Rs 600 per year as compared to taxing the three other markets at less than Rs 600. The attack therefore on the amount actually fixed on the ground of discrimination must fail.

We therefore dismiss the appeal with costs

K.S

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, RAGHUBAR DAYAL, J. R. MUDHOLKAR, R. S. BAGHAWAT AND V. RAMASWAMI, JJ.

Gurbinder Singh and another

.. Appellants\*

v.

Lal Singh and another

.. Respondents.

*Limitation Act (IX of 1908), section 2 (4), Articles 142 and 144—Article 142 when attracted—Suit governed by Article 144—Computation of period of limitation—Tacking of adverse possession of independent trespassers—Permissibility.*

In order that Article 142 of the Limitation Act is attracted the plaintiff must initially have been in possession of the property and should have been dispossessed by the defendant or someone through whom the defendant claims or alternatively the plaintiff should have discontinued possession. When a suit is brought by the plaintiff for the recovery of certain property claiming that he is entitled to it as heir of its previous owner, the fact that the plaintiff was in possession of the property initially for some time will not attract Article 142 if the initial possession was under a different title altogether.

In a suit to which Article 144 of the Limitation Act is attracted the burden is on the defendant to establish that he was in adverse possession for 12 years before the date of suit and for computation of this period he can avail of the adverse possession of any person or persons through whom he claims but not the adverse possession of independent trespassers. The starting point of limitation under Article 144 is the date when the possession of the defendant becomes adverse to the plaintiff. Under section 2 (4) of the Limitation Act 'defendant' includes any person from or through whom a defendant derives his liability to be sued. No doubt, this is an inclusive definition but the gist of it is the existence of jural relationship between different persons. There can be no jural relationship between two independent trespassers.

Where, therefore properties in the possession of one trespasser are trespassed into by another trespasser, a person who obtains title to the properties through the second trespasser will, for the purposes of Article 144, be entitled to the benefit of the adverse possession of the second trespasser in addition to his own, but is not entitled to tack on the adverse possession of the first trespasser.

Appeal from the Judgment and Decree dated 21st May, 1958, of the Punjab High Court in Civil Regular Second Appeal No. 263-P of 1952.

*Tarachand Brijmohanlal*, Advocate, for Appellants.

*B. R. L. Iyenger, S. K. Mehta and K. L. Mehta*, Advocates, for Respondents.

The Judgment of the Court was delivered by

*Mudholkar, J.*—The only question for consideration in this appeal by certificate from the High Court of Punjab is whether the suit for possession instituted by the respondents Lal Singh and Pratap Singh is within time. According to the appellants the suit is governed not by Article 141 of the Limitation Act, 1908 (IX of 1908) as held by the High Court but either by Article 142 or by Article 144 and is on that basis barred by time. While it is conceded on behalf of the respondents that the suit is not governed by Article 141 it is contended that it is governed by Article 144 and not by Article 142 and is within time. In order to appreciate the contentions it is necessary to set out the relevant facts which are no longer in dispute.

Mst. Raj Kaur was in possession of 85½ kanals 18 marlas of land situate in village Dhaipai in the former State of Faridkot. Out of this land 48½ kanals 7 marlas was in her possession as occupancy tenant, the landlord being the Raja of Faridkot while the remaining land was held by Mst. Raj Kaur as Adna Malik, the Aala malik again being the said Raja of Faridkot. In Samvat 1953 (A.D. 1896) Mst. Raj Kaur who had two daughters Prem Kaur and Mahan Kaur, adopted the former's son Bakshi Singh and put him in possession of the whole of the land. Bakshi Singh transferred part of the land to Pratap Singh, second son of Mahan

Kaur, who is respondent No. 2 in the appeal. Mahan Kaur had one more son Lal Singh and he is respondent No. 1 in this appeal.

In the year 1915 the Raja of Faridkot filed a suit against Bakshi Singh and Raj Kaur in the Court of Sub Judge, Faridkot for a declaration that the adoption of Bakshi Singh was invalid. This suit was decreed on 9th February, 1916. Raj Kaur died on 14th August, 1930. On 19th February, 1934 the Raja filed two suits against Bakshi Singh and Pratap Singh for possession of the afore mentioned lands one pertaining to the land of which Raj Kaur was occupancy tenant and the other for that of the land of which she was Adna malik. These suits were decreed on 12th March, 1938, and in execution of the decrees obtained in these suits the Raja took possession of the entire land in October, 1938. On 7th April, 1948, he sold the entire land along with some other land to one Kehar Singh for Rs 84 357 5-0. Thereupon Gurbinder Singh and Balbinder Singh, who are the appellants before us, filed a suit for pre-emption of the land against Kehar Singh and obtained a decree in their favour. In execution of that decree they got possession of the land on 22nd June, 1950.

On 20th October 1948 Mst Prem Kaur instituted a suit for possession of the entire land on the ground that she was the legal heir of Raj Kaur against Kehar Singh and the Raja of Faridkot. Later she impleaded the appellants as defendants to that suit and discharged the Raja of Faridkot. On 17th February, 1950, Lal Singh, respondent No. 1 filed a suit for possession of the entire land against the Raja of Faridkot and Kehar Singh. To that suit he joined Prem Kaur and Pratap Singh as defendants. Later however, Pratap Singh was transposed as a plaintiff. Both the suits were consolidated and were tried together. The suit of Prem Kaur was dismissed by the trial Court but that of the respondents was decreed to the extent of half share in the property. Prem Kaur and the appellants preferred appeals before the District Court but that Court dismissed both the appeals. A Second Appeal was taken by the appellants as well as by Prem Kaur to the High Court and cross objections were preferred by the respondents. The High Court dismissed these appeals as well as the cross-objections.

In the absence of any appeal by Prem Kaur against the decision of the High Court confirming the dismissal of her suit we have only to consider the claim of the respondents to half the property left by Raj Kaur. Their claim was resisted by the appellants on several grounds in the Courts below. Before us, however, only one ground is pressed and that is the suit is barred by limitation. As already stated, according to the appellants, the suit is governed either by Article 142 or by Article 144 of the Limitation Act and not by Article 141. Mr Iyengar for the respondents does not rely upon Article 141 at all. He also contends that Article 142 has no application and that the suit is governed by Article 144 only. Mr Tarachand Brijmohanlal for the appellants also relied on Article 144 in the alternative.

In order that Article 142 is attracted the plaintiff must initially have been in possession of the property and should have been dispossessed by the defendant or someone through whom the defendants claim or alternatively the plaintiff should have discontinued possession. It is no one's case that Lal Singh ever was in possession of the property. It is true that Pratap Singh was in possession of part of the property—which particular part we do not know—by reason of a transfer thereof in his favour by Bakshi Singh. In the present suit both Lal Singh and Pratap Singh assert their claim to property by succession in accordance with the rules contained in the *dastur ul-amal* whereas the possession of Pratap Singh for some time was under a different title altogether. So far as the present suit is concerned it must, therefore be said that the plaintiffs-respondents were never in possession as heirs of Raj Kaur and consequently Article 142 would not be attracted to their suit.

<sup>1</sup> It is in these circumstances that we have to consider whether under Article 144 the suit is barred by time. The starting point of limitation set out in col 3 of Article 144 is as follows:

"When the possession of the defendant becomes adverse to the plaintiff."

To recapitulate the events, Raj Kaur died on 14th August, 1930, whereupon under *dastur-ul-amal* her daughters Prem Kaur and Mahan Kaur became entitled to the possession of the land. According to the appellants the daughters succeeding their mother took an absolute estate. Assuming that that is so, what would be the position? As already stated, Bakshi Singh and Pratap Singh were in possession of the entire land belonging to Raj Kaur. Ignoring for the time being their relationship with Raj Kaur, what can be said is that they were adversely in possession to the true owners, that is, Prem Kaur and Mahan Kaur, daughters of Raj Kaur as from 14th August, 1930. Before, however, they could perfect their title against Prem Kaur and Mahan Kaur the Raja instituted a suit for possession, obtained a decree thereunder and actually entered into possession of the entire land in October, 1938. Though the Raja obtained possession under a decree of the Court he was in the eye of law nothing but a trespasser in so far as the heirs of Raj Kaur, her daughters Prem Kaur and Mahan Kaur were concerned. Mahan Kaur had in fact died on 13th July, 1938, i.e., before the Raja obtained possession. Therefore, it is more accurate to say that the possession of the Raja became adverse to Prem Kaur and to the respondents Lal Singh and Pratap Singh as from October, 1938. Kehar Singh who was a transferee from the Raja stood in the Raja's position and got the benefit of the Raja's adverse possession. Similarly the appellants who had pre-empted these lands under the decree obtained against Kehar Singh got advantage not only of the Raja's adverse possession but also of Kehar Singh's. The sum total of the adverse possession of these three persons at the date of the respondents' suit would, however, be less than 12 years and so the respondents' suit could not be said to be barred by Article 144 if the starting point of limitation is taken to be some day in October, 1938.

Mr. Tarachand Brijmohanlal, however, advanced an interesting argument to the effect that if persons entitled to immediate possession of land are somehow kept out of possession—may be by different trespassers—for a period of 12 years or over, their suit will be barred by time. He points out that as from the death of Raj Kaur her daughters, through one of whom the respondents claim, were kept out of possession by trespassers and that from the date of Raj Kaur's death right up to the date of the respondents' suit, that is, for a period of nearly 20 years trespassers were in possession of Mahan Kaur's and after her death, the respondents' share in the land their suit must, therefore, be regarded as barred by time. In other words, the learned Counsel wants to tack on the adverse possession of Bakshi Singh and Pratap Singh to the adverse possession of the Raja and those who claim through him. In support of the contention reliance is placed by learned Counsel on the decision in *Ramayya v. Kotamma*<sup>1</sup>. In order to appreciate what was decided in that case a brief resume of the facts of that case is necessary. Mallabattudu, the last male holder of the properties to which the suit related, died in the year 1889 leaving two daughters Ramamma and Govindamma. The former died in 1914. The latter surrendered her estate to her two sons. The plaintiff who was a transferee from the sons of Govindamma instituted a suit for recovery of possession of Mallabattudu's property against Punnayya, the son of Ramamma to whom Mallabattudu had made an oral gift of his properties two years before his death. Punnayya was minor at the date of gift and his elder brother Subbarayudu was managing the property on his behalf. Punnayya, however, died in 1894 while still a minor and thereafter his brothers Subbarayudu and two others were in possession of the property. It would seem that the other brothers died and Subbarayudu was the last surviving member of Punnayya's family. Upon Subbarayudu's death the properties were sold by his daughters to the third defendant. The plaintiffs-appellants' suit failed on the ground of limitation. It was argued on his behalf in the Second Appeal before the High Court that as the gift to Punnayya was oral it was invalid, that consequently Punnayya was in possession as trespasser, that on Punnayya's death his heir would be his mother, that as Subbarayudu continued in possession Subbarayudu's possession was also that of a trespasser, that as neither Subbarayudu nor Punnayya completed possession

for 12 years they could not tack on one to the other and that the plaintiff claiming through the nearest reversioner is not barred. The contention for the respondents was that there was no break in possession so as to reversion the properties in the original owners that Punnayya and Subbarayudu cannot be treated as successive trespassers and that in any event the real owner having been out of possession for over 12 years the suit was barred by limitation. The High Court following the decision of Mookerjee, J., in *Mohendra Nath v. Shamsunnessa*<sup>1</sup>, held that time begins to run against the last full owner if he himself was dispossessed and the operation of the law of limitation would not be arrested by the fact that on his death he was succeeded by his widow daughter or mother, as the cause of action cannot be prolonged by the mere transfer of title. It may be mentioned that as Mallabattudu had given up possession to Punnayya under an invalid gift Article 142 of the Limitation Act was clearly attracted. The sons of Govindamma from whom the appellant had purchased the suit properties claimed through Mallabattudu and since time began to run against him from 1887 when he discontinued possession it did not cease to run by the mere fact of his death. In a suit to which that article applies the plaintiff has to prove his possession within 12 years of his suit. Therefore, so long as the total period of the plaintiff's exclusion from possession is at the date of the plaintiff's suit, for a period of 12 years or over, the fact that this exclusion was by different trespassers will not help the plaintiff provided there was a continuity in the period of exclusion. That decision is not applicable to the facts of the case before us. This is a suit to which Article 144 is attracted and the burden is on the defendant to establish that he was in adverse possession for 12 years before the date of suit and for computation of this period he can avail of the adverse possession of any person or persons through whom he claims—but not the adverse possession of independent trespassers.

In so far as the adverse possession of Bakshi Singh and Pratap Singh is concerned it began upon the death of Raj Kaur and not during her lifetime. That being so, Article 142 cannot possibly be attracted whereas the Madras decision turns upon a case to which Article 142 applied. No doubt there on behalf of the plaintiff appellant it was argued on the authority of *Agency Co. v. Short*<sup>2</sup>, that in cases of successive trespassers limitation ceases to run against the lawful owner of the land after an intruder has relinquished his possession, that on the death of Punnayya it must be taken that there was an interruption in the possession and that there was an interval between Punnayya's death and Subbarayudu's taking possession in his own right however minute the interval may be and that except in the case of succession or devolution all other cases would fall within the principle enunciated in *Agency Co.'s case*<sup>3</sup>. The learned Judges did not accept the contention but relying upon the decision in *Wills v. Earl Howe*<sup>4</sup>, and a passage in Dart on Vendors and Purchasers Volume I 7th Edition, page 474 held that the suit was barred by time. It may be pointed out that on Punnayya's death his mother would be the heir and that it was established in that case that she was living with his brother Subbarayudu and his other brothers. Subbarayudu would, therefore, be a presumptive reversioner on the death of his mother and there was evidence to show that she was a consenting party to Subbarayudu's enjoying the properties after Punnayya's death. It is under these circumstances that the High Court found it difficult to hold that there was a fresh trespass by Subbarayudu after the death of Punnayya. On the other hand, according to them there was a continuity of possession because the person who continued to hold possession was the presumptive heir of the deceased. From the facts of the case it will be clear that what was tacked on was not the possession of independent trespassers at all. In the case before us what is being sought to be tacked on to the possession of the Raja and those who claim through him is the possession of Bakshi Singh and Pratap Singh. The Raja in his suit against Bakshi Singh challenged the right of Bakshi Singh and Pratap Singh to possession on the ground that they were trespassers. As it has turned out, the possession of the Raja though obtained under the decree of a civil Court, was in itself a trespass on the rights of

1. (1941) 21 C.L.J. 157, 164.  
2. (1838) L.R. 13 A.C. 793.

3. L.R. (1893) 2 Ch. 545.

the persons who were in law entitled to possession of property. Thus this is a case of one trespasser trespassing against another trespasser. There is no connection between the two and, therefore, in law their possession cannot be tacked on to one another. As pointed out by Varadachariar J., in *Rajagopala Naidu v. Ramasubramania Ayyar*<sup>1</sup> :

“Further the doctrine of independent trespassers will come in only when the second man trespasses upon the possession of the first or the first man abandons possession.”

where it applies the principle laid down in *Agency Co.'s case*<sup>2</sup> would apply and preclude the tacking of possession of successive trespassers. The following observation of Lord Macnaghten in that case are pertinent and run thus :

“They are of opinion that if a person enters upon the land of another and holds possession for a time, and then, without having acquired title under the statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place. There is no one against whom he can bring an action. He cannot make any entry upon himself. There is no positive enactment, nor is there any principle of law which requires him to do any act, to issue any notice or to perform any ceremony in order to rehabilitate himself. No new departure is necessary. The possession of the intruder, ineffectual for the purpose of transferring title, ceases upon its abandonment to be effectual for any purpose. It does not leave behind it any cloud on the title of the rightful owner, or any secret process at work for the possible benefit in time to come of some casual interloper or lucky vagrant. There is not, in their Lordships' opinion, any analogy between the case supposed and the case of successive disabilities mentioned in the statute. There the statute 'continues to run' because there is a person in possession in whose favour it is running.”

This view has not been departed from in any case. At any rate none was brought to our notice where it has not been followed. Apart from that what we are concerned with is the language used by the Legislature in the third column of Article 144. The starting point of limitation there stated is the date when the possession of the defendant becomes adverse to the plaintiff. The word “defendant” is defined thus in section 2 (4) of the Limitation Act thus :

“‘defendant’ includes any person from or through whom a defendant derives his liability to be sued.”

No doubt, this is an inclusive definition but the gist of it is the existence of a jural relationship between different persons. There can be no jural relationship between two independent trespassers. Therefore, where a defendant in possession of property is sued by a person who has title to it but is out of possession what he has to show in defence is that he or anyone through whom he claims has been in possession for more than the statutory period. An independent trespasser not being such a person the defendant is not entitled to tack on the previous possession of that person to his own possession. In our opinion, therefore, the respondent's suit is within time and has been rightly decreed by the Courts below. We dismiss this appeal with costs.

V.K.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, Chief Justice, M. HIDAYATULLAH, J. G. SHAH AND S. M. SIKRI, JJ.

The Sales Tax Officer, Jodhpur and another

.. Appellants\*

v.

M/s. Shiv Ratta G. Mohatta

.. Respondent.

*Constitution of India (1950), Article 226—Scope and object—Sales tax assessment—Remedy available under the Sales Tax Act—Petition under Article 226—Not to be entertained—Nature of order that can be made under Article 226.*

It was not the object of Article 226 of the Constitution to convert High Courts into original or appellate authorities whenever an assessee choose to attack an assessment order on the ground that a sale

1. A.I.R. 1935 Mad. 449.

2. (1888) L.R. 13 A.C. 793.

\*C.A. No. 652 of 1964.

12th February, 1965.

was made in the course of import and therefore exempt from tax. Even if it be that the assessee would have had to deposit sales tax while filing an appeal it does not mean that he can bypass the remedies provided by the Sales Tax Act and file a writ petition. There must be something more in a case to warrant the entertainment of a petition under Article 226 something going to the root of the jurisdiction of the Sales Tax Officer something to show that it would be a case of palpable injustice to the assessee to force him to adopt the remedies provided by the Act.

[In the instant case as the High Court chose to entertain the petition the Supreme Court was not inclined to dismiss the petition on that ground in the stage of appeal against the grant of the writ by the High Court.]

The High Court should not encourage the tendency on the part of the assessee to rush to the High Court after an assessment order is made. It is only in very exceptional circumstances that the High Court should entertain petitions under Article 226 of the Constitution in respect of taxing matters after an assessment order has been made. Under the Sales Tax Acts the facts have to be found by the assessing authorities and it is not the function of the High Court to find facts. When the question of taxability depends upon a precise determination of facts and some of the facts are in dispute or in issue the High Court should decline to decide such questions. In a petition under Article 226 where the prayer is for quashing an assessment order the High Court is necessarily confined to the facts as stated in the order or appearing on the record of the case.

[In the instant case the High Court should not have decided disputed questions of fact, but should merely have quashed the assessment order on the ground that the Sales Tax Officer had not dealt with the question raised before him and remanded the case.]

Appeal from the Judgment and Order dated 7th May, 1963, of the Rajasthan High Court in D B Civil Misc Writ Petition No. 157 of 1962.

G C Kalswal, Advocate-General for Rajasthan (A A Jain and R N Sachdev, Advocates, with him), for Appellants.

M D Bhargava and B D Sharma, Advocates, for Respondent.

The Judgment of the Court was delivered by

Sikri, J.—This appeal by certificate of fitness granted by the Rajasthan High Court is directed against its judgment dated 7th May, 1963, quashing the order of assessment dated 5th March, 1962, made by the Sales Tax Officer, Jodhpur City, in so far as it levied sales tax on the turnover of Rs. 23,92,253.75 nP.

The respondent, M/s. Shiv Ratta G. Mohiatta, which is a partnership firm having its head office at Jodhpur, hereinafter referred to as the assessee claimed before the Sales Tax Officer that they were not liable to be assessed to sales tax in respect of the above turnover because firstly, the assessee was not a dealer within section 2 (f) of the Rajasthan Sales Tax Act (Rajasthan Act XXIX of 1954) with respect to this turnover, and secondly, because the sales were in the course of import within Article 286 (1) (b) of the Constitution. Although the Sales Tax Officer set out the facts of the case relating to the second ground, he deemed it sufficient to assess this turnover on the ground that the assessee was a dealer within section 2 (f) of the Rajasthan Sales Tax Act, without advertent to the second ground. The facts on which the assessee had relied upon to substantiate his second ground were these: The Zeal Pak Cement Factory, Hyderabad (Pakistan), hereinafter called the Pakistan Factory, manufactured cement in Pakistan. The Pakistan Industrial Development Corporation hereinafter called the Pakistan Corporation entered into an agreement with M/s. Milkhiram & Sons (P.), Ltd., Bombay, for the export of cement, manufactured in Pakistan to India. The State Trading Corporation of India entered into an agreement with the said M/s. Milkhiram & Sons for the purchase of *inter alia* 30,000 long tons of cement to be delivered to it F.O.R. Khokhliropar in Pakistan on the border of Rajasthan. The State Trading Corporation appointed the assessee as its agent broadly speaking to look after the import and the sale of the imported cement. The *modus operandi* adopted by the assessee for the sale of the cement was as follows: It would obtain from a buyer in Rajasthan an order under an agreement, a sample of which is on the record. The agreement fixed the price and the terms of supply. By one clause the assessee dis-

claimed any responsibility regarding delay in despatch and non-receipt of consignment or any loss, damage or shortage in transit due to any reason whatsoever. The agreement further provided that "all claims for loss, damage or shortage, etc., during transit will lie with the carriers and our payments are not to be delayed on any such account whatsoever". It was further provided in the agreement that the dues were payable in advance in full, or 90 per cent. in advance and the balance within 15 days of billing plus sales tax and other local taxes. Clause 6 of the agreement is in the following terms :

"A Post Card Loading Advice will be sent to you by the Factory as soon as the wagons are loaded in respect of your orders, and it will be your responsibility to arrange for unloading these consignments timely according to Railway Rules. Ourselves, and the suppliers will not be responsible for demurrage etc., on any account whatsoever. If the consignment reaches earlier than the Railway Receipt, it is the responsibility of buyer to arrange for and get the delivery timely against indemnity bond, etc. All the Railway Receipts etc. will be sent by registered post by the Suppliers in Pakistan."

After this agreement had been entered into, the assessee would send despatch instructions to the Pakistan Corporation. These instructions indicated the name of the buyer-consignee and the destination, and provided that the railway receipt and D/A should be sent by registered post to the consignee. These instructions were sent with a covering letter to the Pakistan Corporation requesting that these instructions be passed on to the Pakistan Factory for necessary action. The Pakistan Corporation would then forward these despatch instructions to the Zcal-Pak Cement Factory. Later, the Pakistan Factory would advise the consignee that they had "consigned to the State Bank of India, Karachi, the particular quantity as per enclosed railway receipt and invoice". The State Bank of India, Karachi, would endorse the railway receipt in favour of the consignee and send it to him by post. The consignee would take delivery either by presentation of the railway receipt or by giving indemnity bond to the Station Master undertaking to deliver the railway receipt on its receipt.

The Sales Tax Officer did set out most of these facts and the contentions of the assessee in the assessment order but disposed of the case with the following observations :

"All the above went to prove that the assessee was an Agent of the non-resident dealer for the supplies in the State. The assessee was an importer and hence submitted an application to the Custom Authority for the same. It booked orders and issued sale bills. Under the terms of an agreement of appointment of Agent, sale was to be effected by the Agent. Again while obtaining orders from the buyers under condition 5 sales tax was to be paid by the buyers to the assessee."

Thus to all intents and purposes the assessee is a dealer who is liable for payment of sales tax to the State. They have rightly collected this amount from the buying dealers and retained with them. This should come to the Government."

We can find no discussion in the order on the question raised by the assessee that the sales were made in the course of import within Article 286 (1) (b) of the Constitution.

The assessee then filed a petition under Article 226 of the Constitution and raised two contentions before the High Court, namely, (1) that the Sales Tax Officer failed to consider the impact and the effect of Article 286 (1) (b) on the facts of the case, and (2) that the Sales Tax Officer illegally held that the petitioner for all intents and purposes was a dealer liable to pay sales tax. The State raised an objection to the maintainability of the petition on the ground that the petitioner should have availed of the alternative remedy of appeal provided under the Rajasthan Sales Tax Act, but the High Court overruled this objection on the ground that

"the contention of the petitioner is that in view of Article 286 (1) (b) of the Constitution, the respondent had no jurisdiction to assess the petitioner to pay the sales tax on the sale of goods in the course of the import into the territory of India,"

and that even if there was no total lack of jurisdiction in assessing the petitioner to pay sales tax, the principle enunciated in *A. V. Venkateswaran v. Ramchand Sobharaj Wadwani*<sup>1</sup>, applied, and it was a case which should not be dismissed *in limine*.

1. (1962) 1 S.C.J. 170 : (1962) 1 M.L.J. (S.C.) 753.  
83 : (1962) 1 A.W.R. (S.C.) 83 : (1962) 1 S.C.R.



Then the High Court proceeded to deal with the merits of the case. It first dealt with the question whether the petitioner was a dealer within the meaning of section 2 (f) of the Rajasthan Sales Tax Act, and came to the conclusion that the petitioner must be deemed to be a dealer within the said section 2 (f).

Then it proceeded to deal with the question whether the sales had taken place in the course of import. The High Court held that in the circumstances of the case these sales had not occasioned the movement of goods but it was the first sale made by M/s Milktharam & Sons to the State Trading Corporation which had occasioned the movement of goods. Secondly, it held that in the circumstances of the case

'the property in goods after the delivery had been taken by the petitioner on behalf of the State Trading Corporation passed to the State Trading Corporation and simultaneously to the ultimate buyers. Thus the property in the goods passed to the ultimate buyers in Rajasthan when the goods had not reached the territory of India and were in course of import. In view of the authority of their Lordships of the Supreme Court in *J. V. Gokal & Co. (Private) Ltd. v. The Assistant Collector of Sales Tax (Inspection) and others*<sup>1</sup> it must be taken that the sale took place when the goods were in the course of the import and they should not be liable to the payment of the sales tax by virtue of Article 286 (1) (b).

In the result, the High Court quashed the order of assessment in so far as it sought to levy tax on the turnover in dispute. The Sales Tax Officer, Jodhpur, and the State of Rajasthan having obtained certificate of fitness from the High Court filed this appeal.

The learned Advocate General has raised two points before us. First, on the facts of this case the High Court should have refused to entertain the petition, and secondly, that it has not been established that the cement was sold in the course of import within Article 286 (1) (b).

Regarding the first point, he urges that an appeal lay against the order of the Sales Tax Officer, no question of the validity of the Sales Tax Act was involved and the taxability of the turnover depended on where the property passed in each consignment. This involved consideration of various facts and, according to him, the crucial facts, had not been brought on the record by the assessee on whom lay the onus to establish that the sales were in the course of import. He says that the assessee should have proved that each railway receipt was endorsed by the State Bank of India, Karachi, to the buyer before each consignment crossed the frontier.

We are of the opinion that the High Court should have declined to entertain the petition. No exceptional circumstances exist in this case to warrant the exercise of the extraordinary jurisdiction under Article 226. It was not the object of Article 226 to convert High Courts into original or appellate assessing authorities whenever an assessee choose to attack an assessment order on the ground that a sale was made in the course of import and therefore exempt from tax. It was urged on behalf of the assessee that they would have had to deposit sales tax while filing an appeal. Even if this is so, does this mean that in every case in which the assessee has to deposit sales tax, he can bypass the remedies provided by the Sales Tax Act? Surely not. There must be something more in a case to warrant the entertainment of a petition under Article 226, something going to the root of the jurisdiction of the Sales Tax Officer, something to show that it would be a case of palpable injustice to the assessee to force him to adopt the remedies provided by the Act. But as the High Court chose to entertain the petition, we are not inclined to dismiss the petition on this ground at this stage.

Regarding the second point, the learned Advocate General argues that the onus was on the assessee to bring his case within Article 286 (1) (b) of the Constitution in respect of the sales to the various consignees. He says that there is no evidence on record as to when the State Bank of India endorsed the railway receipt in favour of the ultimate buyer in respect of each consignment and without this evidence

it cannot be said that the title to the goods passed to the ultimate buyer at Khokhropar or in the course of import. He further urges that it would have to be investigated in each case as to when the State Bank endorsed the railway receipt and when the goods crossed the customs barrier. He says that it is not contested that the ultimate buyer took delivery of goods without producing the railway receipt by virtue of special arrangements entered into with the railway, and according to him, it is only when the delivery was taken by the buyer in Rajasthan that the title passed. By that time, according to him, the course of import had ceased.

We do not think it necessary to consider the various arguments addressed by the learned Advocate-General or the soundness of the view of the High Court on this point, because we are of the opinion that the High Court should not have gone into this question on the facts of this case. The Sales Tax Officer had not dealt with the question at all, and it is not the function of the High Court under Article 226, in taxing matters, to constitute itself into an original authority or an appellate authority to determine questions relating to the taxability of a particular turnover. The proper order in the circumstances of this case would have been to quash the order of assessment and send the case back to the Sales Tax Officer to dispose of it according to law. Under the Rajasthan Sales Tax Act, and other Sales Tax Acts, the facts have to be found by the assessing authorities. If any facts are not found by the Sales Tax Officer, they would be found by the appellate authority, and it is not the function of a High Court to find facts. The High Court should not encourage the tendency on the part of the assessee to rush to the High Court after an assessment order is made. It is only in very exceptional circumstances that the High Court should entertain petitions under Article 226 of the Constitution in respect of taxing matters after an assessment order has been made. It is true, as said by this Court in *A. V. Venkateswaran v. Ramchand Sobharaj Wadwani*<sup>1</sup>, that it would not be desirable to lay down inflexible rules which should be applied with rigidity in every case, but even so when the question of taxability depends upon a precise determination of facts and some of the facts are in dispute or missing, the High Court should decline to decide such questions. It is true that at times the assessee alleges some additional facts not found in the assessment order and the State, after a fresh investigation, admits these facts, but in a petition under Article 226 where the prayer is for quashing an assessment order, the High Court is necessarily confined to the facts as stated in the order or appearing on the record of the case.

In this case, as already indicated, we have come to the conclusion that the High Court should not have decided disputed questions of fact but should merely have quashed the assessment order on the ground that the Sales Tax Officer had not dealt with the question raised before him and remanded the case. Accordingly, we allow the appeal, set aside the order of the High Court, quash the assessment order in so far as it relates to the turnover of Rs. 23,92,252.75 nP. and remit the case to the Sales Tax Officer to decide the case in accordance with law. He will find all the facts necessary for the determination of the question and come to an independent conclusion untrammelled by the views expressed by the High Court. We may make it clear that we are not expressing any view whether the finding of the High Court that the property in the goods passed simultaneously at Khokhropar to the State Trading Corporation and the ultimate buyer is correct or not. There would be no order as to costs in this appeal.

K.S.

*Appeal allowed.*

1. (1962) 1 M.L.J. (S.C.) 83 : (1962) 1 An. S.C.R. 753 : 64 Bom.L.R. 386.  
W.R. (S.G.) 83 : (1962) 1 S.G.J. 170 : (1962) 1

## THE SUPREME COURT OF INDIA

## (Civil Appellate Jurisdiction)

PRESENT — P B GAJENDRAGADKAR, *Chief Justice*, M HIDAYATULLAH, RAGHU BAR DAYAL, S M SIKRI AND V RAMASWAMI, JJ

Brundaban Nayak

*Appellant\**

Election Commission of India and another

*Respondents*

*Representation of the People Act (XLIII of 1951) section 192 (2)—Construction and scope—Question of disqualification—How can be raised*

*Election Commission—Powers—Desirability of legislation vesting powers pointed out*

What the first clause of Article 192 (1) of the Constitution requires is that a question should arise, how it arises by whom it is raised in what circumstances it is raised are not relevant for the purpose of the application of this clause. All that is relevant is that a question of the type contemplated by the clause should arise and so it cannot be said that such a question can be raised only on the floor of the Legislative Assembly and by Members of the Assembly and not by an ordinary citizen or voter in the form of a complaint to the Governor.

The words "the question shall be referred for the decision of the Governor" do not import the assumption that any other authority has to receive the complaint and after a *prima facie* and initial investigation about the complaint send it on or refer it to the Governor for his decision. These words merely emphasise that any question of the type contemplated by clause (1) of Article 192 shall be decided by the Governor and Governor alone, no other authority can decide it, nor can the decision of the said question as such fall within the jurisdiction of the Courts. Any citizen is entitled to make a complaint to the Governor alleging that any member of the Legislative Assembly has incurred one of the disqualifications mentioned in Article 191 (1) and should therefore vacate his seat.

It is the opinion of the Election Commission which is in substance decisive and it is legitimate to assume that when the complaint is received by the Governor and he forwards it to the Election Commission or the Election Commission should proceed to try the complaint before it gives its opinion. It cannot be said that it is the Governor who should make the enquiry and then forward to the Election Commission.

Desirability of appropriate legislation—for vesting Election Commission with the powers of a Commission under the Commissions of Enquiry Act 1952 such as the power to summon witnesses and examine them on oath, the power to compel production of documents and the power to issue Commissions for the examination of witnesses—pointed out.

Appeal by Special Leave from the Order dated 6th January, 1965 of the Circuit Bench of the Punjab High Court at Delhi in Civil Writ No 8-D of 1965.

M C Setalvad, Senior Advocate (Ratinder Narain, J B Dadachany and O C Mathur, Advocates of M/s J B Dadachany & Co with him), for Appellant.

C A Daphlary, Attorney-General for India and S V Gupte, Solicitor General for India (B R L Iyengar and B H Dhebar, Advocates, with them), for Respondent No 1.

Santosh Chatterjee, B B Ratho and M L Chhibber, Advocates, for Respondent No 2.

The Judgment of the Court was delivered by

Gajendragadkar, CJ—The principal question which this appeal by Special Leave raises for our decision relates to the construction of Article 192 of the Constitution. The said question arises in this way. The appellant Brundaban Nayak was elected to the Legislative Assembly of Orissa from the Hinguli Constituency in Ganjam district in 1961, and was appointed one of the Ministers of the Council of Ministers in the said State. On 18th August 1964 respondent No 2 P Biswal applied to the Governor of Orissa alleging that the appellant had incurred a disqualification subsequent to his election under Article 191 (1) (c) of the Constitution (read with section 7 of the Representation of the People Act, 1951 (XLIII of 1951) therein after called the Act). In his application, respondent No 2 made several allegations in support of his contention that the appellant had become disqualified to be a

member of the Orissa Legislative Assembly. On 10th September, 1964, the Chief Secretary to the Government of Orissa forwarded the said complaint to respondent No. 1, the Election Commission of India, under the instructions of the Governor. In this communication, the Chief Secretary stated that a question had arisen under Article 191 (1) of the Constitution whether the member in question had been subject to the disqualification alleged by respondent No. 2, and so, he requested respondent No. 1 in the name of the Governor to make such enquiries as it thinks fit and give its opinion for communication to the Governor to enable him to give a decision on the question raised.

On 17th November, 1964 respondent No. 1 served a notice on the appellant forwarding to him a copy of the letter received by it from respondent No. 2 dated the 4th November, 1964. The notice intimated to the appellant that respondent No. 1 proposed to enquire in the matter before giving its opinion on the Governor's reference, and, therefore, called upon him to submit on or before the 5th December, 1964, his reply with supporting affidavits and documents, if any. The appellant was also told that the parties would be heard in person or through authorised Counsel at 10-30 A.M. on the 8th December, 1964, in the office of respondent No. 1 in New Delhi.

On 1st December, 1964, the appellant sent a telegram to respondent No. 1 requesting it to adjourn the hearing of the matter. On the same day, he also addressed a registered letter to respondent No. 1 making the same request. Respondent No. 2 objected to the request made by the appellant for adjourning the hearing of the complaint. On 8th December, 1964, respondent No. 1 took up this matter for consideration. Respondent No. 2 appeared by his Counsel Mr. Chatterjee, but the appellant was absent. Respondent No. 1 took the view that an enquiry of the nature contemplated by Article 192 (2) must be conducted as expeditiously as possible, and so, it was necessary that whatever his other commitments may be, the appellant should arrange to submit at least his statement in reply to the allegations made by respondent No. 2, even if he required some more time for filing affidavits and/or documents in support of his statement. Even so, respondent No. 1 gave the appellant time until the 2nd January, 1965, 10-30 A.M. when it ordered that the matter would be heard.

On 2nd January, 1965, the appellant appeared by his Counsel Mr. Patnaik and respondent No. 2 by his Counsel Mr. Chatterjee. On this occasion, Mr. Patnaik raised the question about the maintainability of the proceedings before respondent No. 1 and its competence to hold the enquiry. Mr. Chatterjee repelled Mr. Patnaik's contention. Respondent No. 1 overruled Mr. Patnaik's contention and recorded his conclusion that it was competent to hold the enquiry under Article 192 (2). Mr. Patnaik then asked for adjournment and made it clear that he was making the motion for adjournment without submitting to the jurisdiction of respondent No. 1. In view of the attitude adopted by Mr. Patnaik, respondent No. 1 took the view that it would be pointless to adjourn the proceedings, and so, it heard Mr. Chatterjee in support of the case of respondent No. 2. After hearing Mr. Chatterjee, respondent No. 1 reserved its orders on the enquiry and noted that its opinion would be communicated to the Governor as early as possible.

When matters had reached this stage before respondent No. 1, the appellant moved the Punjab High Court under Article 226 of the Constitution praying that the enquiry which respondent No. 1 was holding, should be quashed on the ground that it was incompetent and without jurisdiction. This writ petition was summarily dismissed by the said High Court on 6th January, 1965. Thereafter, the appellant applied to this Court for Special Leave on 8th January, 1965, and Special Leave was granted to him on 14th January, 1965. The appellant then moved this Court for stay of further proceedings before respondent No. 1, and the said prayer was granted. When Special Leave was granted to the appellant, this Court had made an order that the preparation of the record and the filing of Statements of the Case should be dispensed with and the appeal should be heard on the paper-book filed along with the

Special Leave petition and must be placed for hearing within three weeks. That is how the matter has come before us for final disposal.

Since the Punjab High Court had dismissed the writ petition filed by the appellant *in limine*, neither of the two respondents had an opportunity to file their replies to the allegations made by the appellant in his writ petition. That is why both respondent No. 1 and respondent No. 2 have filed counter affidavits in the present appeal setting out all the relevant facts on which they wish to rely. The appellant has filed an affidavit in reply. All these documents have been taken on the record at the time of the hearing of this appeal. It appears from the affidavit filed by Mr. Prakash Narain, Secretary to respondent No. 1, that when notice issued by respondent No. 1 on the 17th November, 1964, was served on the appellant, through oversight the original complaint filed by respondent No. 2 before the Governor of Orissa and the reference made by the Governor to respondent No. 1 were not forwarded to the appellant. At the hearing before us it is not disputed by the appellant that a complaint was in fact made by respondent No. 2 before the Governor of Orissa and that the Governor had then referred the matter to respondent No. 1 for its opinion.

Let us then refer to Article 192 which falls to be construed in the present appeals. Before reading this article it is relevant to refer to Article 191. Article 191 (1) provides that a person shall be disqualified for being chosen as and for being a member of the Legislative Assembly or Legislative Council of a State if *inter alia* he is so disqualified by or under any law made by Parliament. There are four other disqualifications prescribed by clauses (a) to (d) with which we are not concerned in the present appeal. It is the disqualification prescribed by clause (e) on which respondent No. 2 relies in support of the complaint made by him to the Governor. As we have already indicated respondent No. 2's case is that the appellant has incurred the disqualification under Article 191 (1) (e) read with section 7 (d) of the Act and this disqualification has been incurred by him subsequent to his election. It is well-settled that the disqualification to which Article 191 (1) refers must be incurred subsequent to the election of the member. This conclusion follows from the provisions of Article 190 (3) (a). This Article refers to the vacation of seats by members duly elected. Sub-article (3) (a) provides that if a member of a House of the Legislature of a State becomes subject to any of the disqualifications mentioned in clause (1) of Article 191, his seat shall thereupon become vacant. Incidentally, we may add that corresponding provisions with regard to the disqualification of members of both Houses of Parliament are prescribed by Articles 191, 192 and 193 of the Constitution. It has been held by this Court in *Election Commission India v. Suka Venkata Subba Rao and Union of India—Intervener*,<sup>1</sup> that Articles 190 (3) and 192 (1) are applicable only to disqualifications to which a member becomes subject after being elected as such. There is no doubt that the allegations made by respondent No. 2 in his complaint before the Governor, *prima facie*, indicate that the disqualification on which respondent No. 2 relies has arisen subsequent to the election of the appellant in 1961.

Reverting then to Article 192, the question which we have to decide in the present appeal is whether respondent No. 1 is entitled to hold an enquiry before giving its opinion to the Governor as required by Article 192 (2). Let us read Article 192.

"(1) If any question arises as to whether a member of a House of the Legislature of a State has become subject to any of the disqualifications mentioned in clause (1) of Article 191, the question shall be referred for the decision of the Governor and his decision shall be final.

"(2) Before giving any decision on any such question the Governor shall obtain the opinion of the Election Commission and shall act according to such opinion."

Mr. Setalvad for the appellant contends that in the present case no question can be said to have arisen as to whether the appellant has become subject to any of the disqualifications mentioned in clause (1) of Article 191, because his case is that such a question can be raised only on the floor of the Legislative Assembly and can be raised by members of the Assembly and not by an ordinary citizen or voter in the form of a complaint to the Governor. Mr. Setalvad did not dispute the fact

that this contention has not been taken by the appellant either in his Writ Petition before the High Court or even in his application for Special Leave before this Court. In fact, the case sought to be made out by the appellant in the present proceedings appears to be that though a question may have arisen about this disqualification, it is the Governor alone who can hold the enquiry and not respondent No. 1. Even so, we have allowed Mr. Setalvad to raise this point, because it is purely a question of law depending upon the construction of Article 192 (1).

In support of his argument, Mr. Setalvad refers to the fact that Article 192 occurs in Chapter III of Part VI which deals with the State Legislature, and he invited our attention to the fact that under Article 199 (3) which deals with a question as to whether a Bill introduced in the Legislature of a State which has a Legislative Council is a Money Bill or not, the decision of the Speaker of the Legislative Assembly of such State thereon shall be final. He urges that just as the question contemplated by Article 199 (3) can be raised only on the floor of the House, so can the question about a subsequent disqualification of a member of a Legislative Assembly be raised on the floor of the House and nowhere else. He concedes that whereas the question contemplated by Article 199 (3) has to be decided by the Speaker and his decision is final, the authority to decide the question under Article 192 (1) is not vested in the Speaker, but is vested in the Governor. In other words, the context in which Article 192 (1) occurs is pressed into service by Mr. Setalvad in support of his argument.

Mr. Setalvad also relies on the fact that Article 192 (1) provides that if any question arises, it shall be referred for the decision of the Governor and this clause, says Mr. Setalvad, suggests that there should be some referring authority which makes a reference of the question to the Governor for his decision. According to him, this referring authority, by necessary implication, is the Speaker of the Legislative Assembly. There is another argument which he has advanced before us in support of this construction. Article 192 (2) requires that whenever a question is referred to the Governor, he shall obtain the opinion of the Election Commission, and Mr. Setalvad suggests that it could not have been the intention of the Constitution to require the Governor to refer to the Election Commission every question which is raised about an alleged disqualification of a member of a Legislative Assembly even though such a question may be patently frivolous or unsustainable.

We are not impressed by these arguments. It is significant that the first clause of Article 192 (1) does not permit of any limitations such as Mr. Setalvad suggests. What the said clause requires is that a question should arise; how it arises, by whom it is raised, in what circumstances it is raised, are not relevant for the purpose of the application of this clause. All that is relevant is that a question of the type mentioned by the clause should arise; and so, the limitation which Mr. Setalvad seeks to introduce in the construction of the first part of Article 192 (1) is plainly inconsistent with the words used in the said clause.

Then as to the argument based on the words "the question shall be referred for the decision of the Governor," these words do not import the assumption that any other authority has to receive the complaint and after a *prima facie* and initial investigation about the complaint, send it on or refer it to the Governor for his decision. These words merely emphasise that any question of the type contemplated by clause (1) of Article 192 shall be decided by the Governor and Governor alone; no other authority can decide it, nor can the decision of the said question as such fall within the jurisdiction of the Courts. That is the significance of the words "shall be referred for the decision of the Governor". If the intention was that the question must be raised first in the Legislative Assembly and after a *prima facie* examination by the Speaker it should be referred by him to the Governor, Article 192 (1) would have been worded in an entirely different manner. We do not think there is any justification for reading such serious limitations in Article 192 (1) merely by implication.

It is true that Article 192 (2) requires that whenever a question arises as to the subsequent disqualification of a member of the Legislative Assembly, it has to be forwarded by the Governor to the Election Commission for its opinion. It is conceivable that in some cases complaints made to the Governor may be frivolous or fantastic, but if they are of such a character the Election Commission will find no difficulty in expressing its opinion that they should be rejected straightaway. The object of Article 192 is plain. No person who has incurred any of the disqualifications specified by Article 191 (1), is entitled to continue to be a member of the Legislative Assembly of a State and since the obligation to vacate his seat as a result of his subsequent disqualification has been imposed by the Constitution itself by Article 190 (3) (a) there should be no difficulty in holding that any citizen is entitled to make a complaint to the Governor alleging that any member of the Legislative Assembly has incurred one of the disqualifications mentioned in Article 191 (1) and should, therefore, vacate his seat. The whole object of democratic elections is to constitute Legislative Chambers composed of members who are entitled to that status, and if any member forfeits that status by reason of a subsequent disqualification, it is in the interests of the constituency which such a member represents that the matter should be brought to the notice of the Governor and decided by him in accordance with the provisions of Article 192 (2). Therefore, we must reject Mr Setalvad's argument that a question has not arisen in the present proceedings as required by Article 192 (1).

The next point which Mr Setalvad has raised is that even if a question is held to have arisen under Article 192 (1) it is for the Governor to hold the enquiry and not for the Election Commission. He contends, that Article 192 (1) requires the question to be referred to the Governor for his decision and provides that his decision shall be final. It is a normal requirement of the rule of law that a person who decides should be empowered to hold the enquiry which would enable him to reach his decision and since the Governor decides the question he must hold the enquiry and not the Election Commission. That, in substance, is Mr Setalvad's case. He concedes that Article 192 (2) requires that the Governor has to pronounce his decision in accordance with the opinion given by the Election Commission, that is a constitutional obligation imposed on the Governor. He, however, argues that the Election Commission which has to give an opinion is not competent to hold the enquiry, but it is the Governor who should hold the enquiry and then forward to the Election Commission all the material collected in such an enquiry to enable it to form its opinion and communicate the same to the Governor.

We are satisfied that this contention also is not well founded. The scheme of Article 192 (1) and (2) is absolutely clear. The decision on the question raised under Article 192 (1) has no doubt to be pronounced by the Governor, but that decision has to be in accordance with the opinion of the Election Commission. The object of this provision clearly is to leave it to the Election Commission to decide the matter, though the decision as such would formally be pronounced in the name of the Governor. When the Governor pronounces his decision under Article 192 (1), he is not required to consult his Council of Ministers, he is not even required to consider and decide the matter himself, he has merely to forward the question to the Election Commission for its opinion and as soon as the opinion is received "he shall act according to such opinion". In regard to complaints made against the election of members to the Legislative Assembly, the jurisdiction to decide such complaints is left with the Election Tribunal under the relevant provisions of the Act. That means that all allegations made challenging the validity of the election of any member, have to be tried by the Election Tribunals constituted by the Election Commission. Similarly, all complaints in respect of disqualifications subsequently incurred by members who have been validly elected have in substance, to be tried by the Election Commission, though the decision in form has to be pronounced by the Governor. If this scheme of Article 192 (1) and (2) is borne in mind there would be no difficulty in rejecting Mr Setalvad's contention that the enquiry must be held by the Governor. It is the opinion of the Election Commission which is in substance decisive, and it is legitimate to assume that when the

complaint is received by the Governor, and he forwards it to the Election Commission, and the Election Commission should proceed to try the complaint before it gives its opinion. Therefore, we are satisfied that respondent No. 1 acted within its jurisdiction when it served a notice on the appellant calling upon him to file his statement and produce his evidence in support thereof.

Mr. Sctalvad faintly attempted to argue that the failure of respondent No. 1 to furnish the appellant with a copy of the complaint made by respondent No. 2 before the Governor and of the order of reference passed by the Governor forwarding the said complaint to respondent No. 1, rendered the proceedings before respondent No. 1 illegal. This contention is plainly misconceived. As soon as respondent No. 1 received the complaint and the order of reference which was communicated to it by the Chief Secretary to the Government of Orissa, it was seized of the matter and it was plainly acting within its jurisdiction under Article 192 (2) when it served the notice on the appellant. As we have already indicated, it was through oversight that the two documents were not forwarded to the appellant along with the notice, but that cannot in any sense affect the jurisdiction of respondent No. 1 to hold the enquiry. In fact, as respondent No. 2 has pointed out in his affidavit, the fact that a reference had been made by the Governor to respondent No. 1 was known all over the State, and it is futile for the appellant to suggest that when he received the notice from respondent No. 1, he did not know that a complaint had been made against him to the Governor alleging that subsequent to his election, he had incurred a disqualification as contemplated by Article 191 (1) (c) of the Constitution read with section 7 (d) of the Act. It would have been better if the appellant had not raised such a plea in the present proceedings.

In this connection, we ought to point out that so far the practice followed in respect of such complaints has consistently recognised that the enquiry is to be held by the Election Commission both under Article 192 (2) and Article 103 (2). In fact, the learned Attorney-General for respondent No. 1 stated before us that though on several occasions, the Election Commission has held enquiries before communicating its opinion either to the President under Article 103 (2) or to the Governor under Article 192 (2), no one ever thought of raising the contention that the enquiry must be held by the President or the Governor respectively under Article 103 (1) and Article 192 (1). He suggested that the main object of the appellant in taking such a plea was to prolong the proceedings before respondent No. 1. In the first instance, the appellant asked for a long adjournment and when that request was refused by respondent No. 1, he adopted the present proceedings solely with the object of avoiding an early decision by the Governor on the complaint made against the appellant by respondent No. 2. We cannot say that there is no substance in this suggestion.

There is one more point to which we may refer before we part with this appeal. Our attention was drawn by the learned Attorney-General to the observations made by the Chief Election Commissioner when he rendered his opinion to the Governor on 30th May, 1964, on a similar question under Article 192 (2) in respect of the alleged disqualification of Mr. Biren Mitra, a member of the Orissa Legislative Assembly. "Where, as in the present cases," observed the Chief Election Commissioner,

"the relevant facts are in dispute and can only be ascertained after a proper enquiry, the Commission finds itself in the unsatisfactory position of having to give a decisive opinion on the basis of such affidavits and documents as may be produced before it by interested parties. It is desirable that the Election Commission should be vested with the powers of a Commission under the Commissions of Enquiry Act, 1952, such as the power to summon witnesses and examine them on oath, the power to compel the production of documents, and the power to issue commissions for the examination of witnesses."

We would like to invite the attention of Parliament to these observations, because we think that the difficulty experienced by the Election Commission in rendering its opinion under Article 103 (2) or Article 192 (2) appears to be genuine, and so, Parliament may well consider whether the suggestion made by the Chief Election Commissioner should not be accepted and appropriate legislation adopted in that behalf.



The result is the appeal fails and is dismissed with costs. In view of the fact that the present proceedings have unnecessarily protracted the enquiry before respondent No 1, we suggest that respondent No 1 should proceed to consider the matter and forward its opinion to the Governor as early as possible. It is hardly necessary to point out that in case the allegations made against the appellant are found to be valid and the opinion of respondent No 1 is in favour of the case set out by respondent No 2 complications may arise by reason of the constitutional provision prescribed by Article 190 (3). In view of the said provision it is of utmost importance that complaints made under Article 192 (1) must be disposed of as expeditiously as possible.

K S

*Appeal dismissed*

## THE SUPREME COURT OF INDIA

(Criminal Appellate Jurisdiction.)

PRESENT —H. SUBBA RAO, J. C. SHAN AND R. S. BACHAWAT JJ

Sahoo

*Appellant\**

The State of Uttar Pradesh

*Respondent*

*Evidence Act (I of 1872) sections 24 to 30—Confession—Confessional soliloquy—If direct piece of evidence—Wright to be attached to such evidence*

A statement whether communicated or not admitting guilt is a confession of guilt. A confessional soliloquy is a direct piece of evidence. Before such evidence can be accepted it must be established by cogent evidence what were the exact words used by the accused. Even if so much was established prudence and justice demand that such evidence cannot be made the sole ground of conviction. It may be used only as a corroborative piece of evidence. Where the circumstantial evidence lead to the only conclusion that the accused must have committed the murder and no other hypothesis was or could be suggested the confessional soliloquy of the accused [that he had finished his daughter in law and thereby finished the daily quarrels] is relevant evidence and it certainly corroborates the circumstantial evidence adduced in the case.

Appeal from the Judgment and Order dated 16th September, 1964 of the Allahabad High Court in Criminal Appeal No 348 of 1964 and Capital Sentence No 18 of 1964.

P. C. Khanna Advocate (at State expense), for Appellant

O. P. Rana Advocate, for Respondent

The Judgment of the Court was delivered by

*Subba Rao J*—Sahoo the appellant is a resident of Pachperwa in the District of Gonda. He has two sons Badri and Kirpa Shankar. He lost his wife years ago. His eldest son Badri married one Sunderpatti. Badri was employed in Lucknow and his wife was residing with his father. It is said that Sunderpatti developed illicit intimacy with Sahoo, but there were incessant quarrels between them. On 12th August 1963 during one of those quarrels Sunderpatti ran away to the house of one Mohammed Abdullah a neighbour of theirs. The appellant brought her back, and after some wordy altercation between them they slept in the only room of their house. The only other inmate of the house was the appellant's second son Kirpa Shankar a lad of about 8 years. On the morning of 13th August 1963 Sunderpatti was found with serious injuries in the room of the house where she was sleeping and the appellant was not in the house. Sunderpatti was admitted in the Sadar Hospital Gonda at 5-25 P.M. on that day and she died on 26th August, 1963 at 3 P.M. Sahoo was sent up for trial before the Court of Sessions Gonda on a charge under section 302 of the Indian Penal Code.

The learned Sessions Judge on a consideration of the entire evidence came to the conclusion that Sahoo killed Sunderpatti. On that finding he convicted the accused under section 302 of the Indian Penal Code and sentenced him to death.

On appeal, a Division Bench of the High Court at Allahabad confirmed both the conviction and the sentence. Hence the appeal.

Except for an extra-judicial confession, the entire evidence in the case is circumstantial. Before we advert to the arguments advanced in the appeal it will be convenient to narrate the circumstances found by the High Court, which are as follows : (1) The accused had illicit connections with the deceased ; (2) the deceased and the accused had some quarrel on the Janmashtami day in the evening and the deceased had to be persuaded through the influence of their neighbours, Mohammed Abdullah and his womenfolk, to go back to the house of the accused ; (3) the deceased was seen in the company of the accused for the last time when she was alive ; (4) during the fateful night 3 persons, namely, the accused, the deceased and the accused's second son, Kirpa Shankar (P.W. 17), slept in the room inside the house ; (5) on the early morning of next day, P.W. 17 was asked by his father to go out to attend to calls of nature, and when he came back to the verandha of the house he heard some gurgling sound, and he saw his father going out of the house murmuring something ; and (6) P.Ws. 9, 11, 13 and 15 saw the accused going out of the house at about 6 A.M. on that day soliloquying that he had finished Sunderpatti and thereby finished the daily quarrels.

This Court in a series of decisions has reaffirmed the following well settled rule of "circumstantial evidence." The circumstances from which the conclusion of guilt is to be drawn should be in the first instance fully established.

"All the facts so established should be consistent only with the hypothesis of the guilt of the accused and the circumstances should be of a conclusive nature and tendency that they should be such as to exclude other hypothesis but the one proposed to be proved."

Before we consider whether the circumstances narrated above would stand the said rigorous test, we will at the outset deal with the contention that the soliloquy of the accused admitting his guilt was not an extra-judicial confession as the Courts below held it to be. If it was an extra-judicial confession, it would really partake the character of direct evidence rather than that of circumstantial evidence. It is argued that it is implicit in the concept of confession, whether it is extra-judicial or judicial, that it shall be communicated to another. It is said that one cannot confess to himself : he can only confess to another. This raises an interesting point, which falls to be decided on a consideration of the relevant provisions of the Evidence Act. Sections 24 to 30 of the Evidence Act deal with the admissibility of confessions by accused persons in criminal cases. But the expression "confession" is not defined. The Judicial Committee in *Pakala Narayana v. R.*<sup>1</sup>, has defined the said expression thus :

"A confession is a statement made by an accused which must either admit in terms of the offence, or at any rate substantially all the facts which constitute the offence."

A scrutiny of the provisions of sections 17 to 30 of the Evidence Act discloses, as one learned author puts it, that statement is a genus, admission is the species and confession is the sub-species. Shortly stated, a confession is a statement made by an accused admitting his guilt. What does the expression "statement" mean ? The dictionary meaning of the word "statement" is "the act of stating, reciting or presenting verbally or on paper." The term "statement", therefore, includes both oral and written statements. Is it also a necessary ingredient of the term that it shall be communicated to another ? The dictionary meaning of the term does not warrant any such extension ; nor the reason of the rule underlying the doctrine of admission or confession demands it. Admissions and confessions are exceptions to the hearsay rule. The Evidence Act places them in the category of relevant evidence, presumably on the ground that, as they are declarations against the interest of the person making them, they are probably true. The probative value of an admission or a confession does not depend upon its communication to another, though, just like any other piece of evidence, it can be admitted in evidence only on proof. This proof in the case of oral admission or confession can be offered only

1. (1939) L.R. 66 I.A. 66 : (1939) 1 M.L.J. 756 : I.L.R. 18 Pat. 234.

by witnesses who heard the admission or confession, as the case may be. The following illustration pertaining to a written confession brings out the said idea. A kills B, enters in his diary that he had killed him, puts it in his drawer and absconds. When he places his act on record, he does not communicate to another, indeed, he does not have any intention of communicating it to a third party. Even so, at the trial the said statement of the accused can certainly be proved as a confession made by him. If that be so in the case of a statement in writing, there cannot be any difference in principle in the case of an oral statement. Both must stand on the same footing. This aspect of the doctrine of confession received some treatment from well known authors on evidence, like Taylor, Best and Phipson. In 'A Treatise on the Law of Evidence' by Taylor, 11th Edition, Vol. I, the following statement appears at page 596:

What the accused has been overheard muttering to himself, or saying to his wife or to any other person in confidence will be receivable in evidence.

In "The Principles of the Law of Evidence" by W M Best, 12th Edition at page 454, it is stated much to the same effect thus,

"Words addressed to others and writing are no doubt the most usual forms but words uttered in soliloquy seem equally receivable."

We also find the following passage in 'Phipson on Evidence,' 7th Edition, at page 262:

'A statement which the prisoner had been overheard muttering to himself if otherwise than in his sleep is admissible against him if independently proved.'

These passages establish that communication to another is not a necessary ingredient of the concept of 'confession'. In this context a decision of this Court in *Bhogilal Chunilal Pandya v The State of Bombay*<sup>1</sup>, may usefully be referred to. There the question was whether a former statement made by a witness within the meaning of section 157 of the Evidence Act should have been communicated to another before it could be used to corroborate the testimony of another witness. This Court, after considering the relevant provisions of the Evidence Act and the case law on the subject came to the conclusion that the word "statement" used in section 157 meant only "something that is stated" and the element of communication was not necessary before "something that is stated" became a statement under that section. If, as we have said, statement is the genus and confession is only a sub-species of that genus we do not see any reason why the statement implied in the confession should be given a different meaning. We, therefore, hold that a statement, whether communicated or not, admitting guilt is a confession of guilt.

But, there is a clear distinction between the admissibility of an evidence and the weight to be attached to it. A confessional soliloquy is a direct piece of evidence. It may be an expression of conflict of emotion, a conscious effort to stifle the pricked conscience, an argument to find excuses or justification for his act, or a penitent or remorseful act of exaggeration of his part in the crime. The tone may be soft and low, the words may be confused, they may be capable of conflicting interpretations depending on witnesses, whether they are biased or honest, intelligent or ignorant, imaginative or prosaic, as the case may be. Generally they are mutterings of a confused mind. Before such evidence can be accepted, it must be established by cogent evidence what were the exact words used by the accused. Even if so much was established, prudence and justice demand that such evidence cannot be made the sole ground of conviction. It may be used only as a corroborative piece of evidence.

The circumstances found by the High Court, which we have stated earlier, lead to the only conclusion that the accused must have committed the murder. No other reasonable hypothesis was or could be suggested.

Further, in this case, as we have noticed earlier, PWs 11, 13 and 15 deposed that they clearly heard the accused say when he opened the door of the house and

<sup>1</sup> (1959) S.C.J. 240 (1959) 1 V.L.J. (S.C.) (Cr.L.) 103 (1959) Supp. (1) S.C.R. 310.  
101 (1959) 1 An.W.R. (S.C.) 101 (1959) V.L.J.

came out at 6 O'clock in the morning of the fateful day that he had "finished Sunderpatti, his daughter-in-law, and thereby finished the daily quarrels." We hold that this extra-judicial confession is relevant evidence: it certainly corroborates the circumstantial evidence adduced in the case.

In the result, we agree with the conclusion arrived at by the High Court both in regard to the conviction and the sentence. The appeal fails and is dismissed.

K.S.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, J. C. SHAH AND R. S. BACHAWAT, JJ.

State of Madras

.. *Appellant\**

v.

Kunnakudi Melamatam *alias* Annathana Matam  
and another.. *Respondents.*

*Madras Hindu Religious and Charitable Endowments Act (XIX of 1951), sections 62, 93, 103 (i)—Institution held to be not a Math under the Madras Act II of 1927—Finality of the decision—Claim for contribution and audit fees on the basis that it was a Math—Not sustainable under Madras Act II of 1927—Injunction to restrain levy of contribution under Act XIX of 1951—Question cannot be entertained in a suit not instituted under section 62 of the Act of 1951—Section 103 (1) of Act of 1951—No continuance of levy was alleged under the Act of 1927—Estoppel—Institution is one outside the Act of 1927—Act of Head of institution—Not to affect the position of the Institution.*

The institution in question had been held to be not a Math as defined under the Madras Act II of 1927 and thus was outside the purview of the Act. The present suit filed by the Head of the institution, in 1951, was a composite suit, claiming two different reliefs, namely (1) an injunction restraining the levy of contribution and audit fees under Act II of 1927 and (2) an injunction restraining the levy of contributions and audit fees under Act XIX of 1951. The High Court held that the institution was not a Math within the meaning of the Act XIX of 1951. The State appealed,

*Held,*

One of the disputes in the suit, whether the institution is a religious institution within the meaning of Act XIX of 1951 specific provision is made in sections 57, 61 and 62 for determination by the specified authorities and eventually by a suit under section 62. The present suit is not brought under or in conformity with section 62 and consequently, in so far as the suit claimed the relief of injunction restraining the levy of contribution and audit fees under the Act XIX of 1951, it is barred by section 93 of the Act. The decision of the Board in 1932 under Act of 1927 was final for the purpose of that Act, but it is not final for purposes of the Act XIX of 1951.

The decision of the Board under section 84 (1) of the Act of 1927 holding that the institution was outside the purview of the Act, had become final in the absence of any application made to the Court to set aside that decision under section 84 (2). The claim for injunction restraining the levy of contribution and audit fees under the Act of 1927 has to be upheld. Under section 103 (i) of the Act of 1951, contribution not legally payable under the Act of 1927 cannot be made enforceable under the Act of 1951.

The Board could not levy contribution from an institution which was not a Math under the Act of 1927 having regard to the finality of the decision under section 84. Estoppel could not confer on the Board a power which it did not otherwise possess under the Act. The Institution is not estopped by any act or conduct of the Head from contending that it is not a Math within the meaning of the Act of 1927.

Appeal by Special Leave from the Judgement and Order dated 7th January, 1960, of the Madras High Court in Second Appeal No. 1165 of 1955.

*A. Ranganadham Chetty*, Senior Advocate, (*A. V. Ranganam*, Advocate, with him), for Appellant.

*A. V. Viswanathan Sastri*, Senior Advocate, (*T. K. Sundararaman*, Advocate, with him), for Respondent No. 1.

The Judgment of the Court was delivered by

*Bachauat, J* —The institution popularly known as Kunnakudi Melamatam alias Annathana Matam was founded more than 80 years ago by Sri La Sri Maunandaswami, with the object of feeding and rendering relief to poor pilgrims visiting Kunnakudi. The institution was managed by Maunandaswami during his life time and thereafter by his successors, Annamalai, Nityanandaswami, Pooranananda and Ganapathiswamikal. By his will dated 12th December, 1935, Ganapathiswamikal named Muthuramalingam and Nityanandaswami (II) as his successors. Muthuramalingam now claims to be the sole *de facto* and *de jure* trustee of the institution. There are four *Samadhis* inside the Matam premises. A *Lingam* is said to be over the *Samadhi* of the founder, and there are idols of *Vinayagar* on either side of the *Samadhi*. There is an idol of a *Nandi* over another *Samadhi*.

The Madras Hindu Religious Endowments Act, 1926 (Madras Act II of 1927) came into force on 8th February, 1927. Section 9 (7) of the Act defines 'Math' as follows:

'Math' means an institution for the promotion of the Hindu religion presided over by a person whose duty is to engage himself in spiritual service or who exercises or claims to exercise spiritual leadership over a body of disciples and succession to whose office devolves in accordance with the directions of the founder of the institution or is regulated by usage, and includes places of religious worship other than a temple or places of religious instruction which are appurtenant to such institution.

Section 84 of the Act reads thus:

84. (1) If any dispute arises as to whether an institution is a math or temple as defined in the Act or whether a temple is an excepted temple such dispute shall be decided by the Board.

(2) Any person affected by a decision under sub-section (1) may within one year, apply to the Court to modify or set aside such decision, but subject to the result of such application, the order of the Board shall be final.

A question having arisen whether the institution is a Math or a temple as defined in the Act, Sri Ganapathiswamikal, the then head of the institution, preferred a petition dated 6th October, 1931 to the Board of Commissioners for Hindu Religious Endowments praying for a declaration that the institution was not a Math as defined in the Act, and was outside the purview of the Act. After enquiry, the Board by its order dated 12th February, 1932, held that the institution was outside the purview of the Act. The Board held that *Samadhis* of this type could not come under the operation of the Act and the feeding of the pilgrims was not connected with service in any religious institution. Shortly thereafter, Sri Ganapathiswamikal executed a will dated 12th December, 1935, whereby he appointed his successors. Under this will, he charged his successors to manage and look after the properties of the institution and directed that they shall 'carry on, as is done at present, the *Vedam* and *Adicaita Gnana Vicharana*, shall read the *gnana Sastras* and shall also teach the disciples." He also directed his successors to perform certain *Abishekams* and *Gurupoojas*, to maintain the disciples and to offer food profusely by way of alms to the good and respectable people and the *Sadhur*.

On 13th November, 1949, Muthuramalingam filed a petition before the Board asking the Board to take steps for safeguarding the properties of the institution. Subsequently, he filed other petitions requesting the Board to protect the properties of the institution and to remove Nityanandaswami (II) from its trusteeship. Thereafter, the Board appears to have proceeded on the footing that the institution is a *Matam* within the purview of the Act. The Board fixed the annual income of the institution at Rs. 11,800, and served the institution notices of assessment for fasils 1356, 1357, 1358 and 1359 levying contributions at Rs. 354 per fasl and audit fees at Rs. 177 per fasl. Muthuramalingam filed petitions before the Board challenging the assessment and also praying for time to make the payments.

On 17th March 1951, the institution represented by Muthuramalingam filed a suit impugning the Madras Hindu Religious Endowments Board and Nityanandaswami (II) as defendants and praying for an order of injunction, restraining the Board from levying any contribution under sections 69 and 70 of the Act, on the allegation that the institution was outside the purview of the Act and the levy was otherwise

illegal. During the pendency of the suit, on 28th August, 1951, the Madras Hindu Religious and Charitable Endowments Act, 1951 (Madras Act XIX of 1951) came into force. Section 103 (i) of Act XIX of 1951 provided that all suits pending against the Board under the provisions of Act II of 1927 might be continued against the Commissioner of the Hindu Religious Endowments appointed under Act II of 1927. Accordingly, on or about 30th November, 1951, the plaint was amended by impleading the Commissioner as the third defendant. The prayer portion of the plaint was also amended by inserting a claim of injunction restraining the third defendant from levying any contribution under Act XIX of 1951. On 30th January, 1954, the District Munsif, Manamadurai dismissed the suit mainly on the ground that the plaintiff by his own conduct having invited the third defendant to interfere with the administration of the institution was disentitled to the discretionary relief of injunction. The Subordinate Judge, Sivaganga reversed the judgment of the trial Court, and decreed the suit, holding that, as the order of the Board dated 12th February, 1932, had become final, the Board under Act II of 1927 and the Commissioner under Act XIX of 1951 could not proceed against the institution under those Acts at all, and could not levy the contributions and the audit fees from the plaintiff. On further appeal, the Madras High Court by its order dated 11th August, 1958, held that in view of changed circumstances the Board could go behind its previous decision dated 12th February, 1932, and called for a finding from the Subordinate Judge of Sivaganga on the question whether the institution was Math. By his order dated 29th November, 1958, the Subordinate Judge, Sivaganga recorded the finding that the institution is not a Math as defined in Act II of 1927 or in section 6 (10) of Act XIX of 1951. On further hearing of the appeal on 7th January, 1960, the High Court accepted the findings of fact recorded by the Subordinate Judge, and held that the institution was not a Math within the meaning of section 6 (10) of Act XIX of 1951, and on this finding, dismissed the appeal but at the same time, directed that a scheme should be framed under section 92 of the Code of Civil Procedure for the proper administration of the trust, and a copy of the judgment be forwarded to the Advocate-General for necessary action. The State of Madras represented by the Commissioner now appeals to this Court by Special Leave.

In this appeal, it is conceded on behalf of all the appearing parties that the directions of the High Court with regard to the framing of a scheme are misconceived, and must be set aside. In the Courts below a contention that sections 76 (1) and 76 (2) of Act XIX of 1951 were *ultra vires* was raised, but that contention is no longer pressed.

In the judgment of the High Court dated 7th January, 1960, the reasons for holding that the institution is not a Math within the meaning of section 6 (10) of the Act are given thus :

“First of all, there are no properties attached to this institution as such ; secondly there is no college for propaganda of Hindu Religion. But sadhus meet there and are given facilities for the calm and peaceful performance of their religious practices and acts. Thirdly, the head of the institution is not engaging himself in imparting any religious instructions or rendering spiritual services. Fourthly, there is no initiation of sishyas as monks and no upadesam is given to lay disciples initiating them into the mysteries of the particular cult. Fifthly, there is no continuity in the spiritual head in the sense that there is no automatic self-regulating mechanism for the devolution of the office. Therefore these five clinching circumstances show that it is not a mutt within the meaning of section 6 (10) of the Act.”

Curiously, in recording this finding the High Court did not take into account the relevant recitals and statement in the will of Ganapathiswamikal dated 12th December, 1935, which have a material bearing on the question whether the institution is a Math. Elaborate arguments\* were advanced before us on the question whether the institution is a Math within the meaning of Act II of 1927 and Act XIX of 1951. In view of our conclusions on other points, we think that it is not open to us to decide in this appeal whether the institution is a Math within the meaning of those Acts, and the point must be left open.

The suit, as it stands now, is a composite suit, claiming two different reliefs, namely, (1) an injunction restraining the levy of contributions and audit fees under

Act II of 1927, and (2) an injunction restraining the levy of contributions and audit fees under Act XIX of 1951. The two reliefs must be considered separately.

We shall consider firstly the claim of injunction restraining the levy of contributions and audit fees under Act XIX of 1951. Section 6 (10) of this Act defined Math thus :

" 'math' means a Hindu religious institution with properties attached thereto and presided over by a person whose duty it is to engage himself in imparting religious instruction or rendering spiritual service to a body of disciples or who exercises or claims to exercise spiritual headship over such a body, and includes places of religious worship or instruction which are appurtenant to the institution "

Section 6 (15) of the Act defined "religious institution" as meaning a math, temple or specific endowments. Section 57 of the Act provided :

"Subject to the rights of suit or appeal hereinafter provided, the Deputy Commissioner shall have power to inquire into and decide the following disputes and matters .

Under section 61 of the Act, an appeal lay to the Commissioner from the order of the Deputy Commissioner, and under section 62 of the Act, any party aggrieved by the order of the Commissioner might within ninety days of the order institute a suit in the Court against the order. Section 93 of the Act read :

"No suit or other legal proceeding in respect of the administration or management of a religious institution or any other matter or dispute for determining or deciding which provision is made in this Act shall be instituted in any Court of law, except under, and in conformity with, the provisions of this Act "

Now, one of the disputes in this suit is whether the institution is a religious institution within the meaning of Act XIX of 1951. Specific provision is made in sections 57, 61 and 62 of the Act for determination of that dispute by the Deputy Commissioner, the Commissioner and eventually by a suit instituted in a Court under section 62. The present suit is not brought under or in conformity with section 62 and consequently, in so far as the suit claims the relief of injunction restraining the levy of contribution and audit fees under Act XIX of 1951, it is barred by section 93 of the Act. The decision of the Board dated 12th February, 1932, was given under Act II of 1927 and was final for purposes of that Act but it is not final for purposes of Act XIX of 1951.

We shall next consider the claim of injunction restraining the levy of contribution and audit fees under Act II of 1927. By its order dated 12th February, 1932, the Board had decided that the institution was outside the purview of Act II of 1927. That decision was given under section 84 (1) of the Act. No application was made to the Court to modify or set aside the decision in accordance with section 84 (2). Consequently by the express words of section 84 (2), the decision of the Board became final, and for purposes of Act II of 1927, the correctness of the decision is not now open to challenge on the ground that it is erroneous. But Mr. Chetty argued that the decision, though binding on the institution, is not binding on the Board. We cannot accept this contention. The decision is final and binding on the Board also for purposes of Act II of 1927. Mr. Chetty argued secondly that in view of sections 13 and 15 of the Madras General Clauses Act (Madras Act I of 1891) the Board could decide the question whether the plaintiff is a religious institution as often as occasions arose, and its power was not exhausted by the decision given on 12th February, 1932. This argument is misconceived. The sections relied upon do not authorise revocation or annulment of a decision, which has become final. Mr. Chetty next contended that the character of the institution was changed by the will of Ganapathiswamikal, dated 12th December, 1935, and consequently, the decision dated 12th February, 1932, ceased to be binding under Act II of 1927. This contention must also be rejected. Ganapathiswamikal had no power to change the character of the institution, and, as a matter of fact, he did not purport to do so by his will. Mr. Chetty next contended that by making the assessment of the contributions under section 70 of the Act, the Board gave a decision under section 84 (1) that the institution was a Math as defined in the Act, and that decision has become final under section 84 (2). There is no substance in this contention. The order of assessment is not produced. It is not shown that any dispute then arose whether the

institution was a Math as defined in the Act, or that the Board decided that dispute by its order of assessment.

Mr. Chetty argued that by reason of section 103 (i) of Act XIX of 1951, all contributions under Act II of 1927 are payable under Act XIX of 1951 and the assessment and demand in respect of those contributions are enforceable under the latter Act and consequently the suit challenging such assessment and demand is barred by section 93 of Act XIX of 1951. There is no substance in this contention. As the institution was not a Math within the meaning of Act II of 1927 in view of the final decision of the Board dated 12th February, 1932, the contributions demanded under Act II of 1927 were not legally payable to the Board under that Act. Consequently, those contributions were not payable under Act XIX of 1951, and the assessment and demand in respect thereof were not enforceable under the latter Act by reason of section 103 (i) thereof. Section 93 of Act XIX of 1951 did not bar a suit pending on the date of commencement of the Act claiming an injunction restraining the levy of contributions and audit fees under Act II of 1927 on the ground that the institution was outside the purview of Act II of 1927.

Mr. Chetty lastly contended that in view of the conduct of Muthuramalingam asking the Board to interfere with the management of the institution on the ground that it is a Math, the plaintiff is estopped from asserting that it is not a Math within the purview of Act II of 1927. This contention must be rejected. The Board could not levy contribution from an institution which was not a Math under Act II of 1927 having regard to the final decision of the Board dated 12th February, 1932. Estoppel could not confer on the Board a power which it did not otherwise possess under the Act. Moreover, it is not shown that by reason of the acts of Muthuramalingam, the Board came to believe that the institution was a Math and to act upon such belief. The plaintiff is not estopped by any act or conduct of Muthuramalingam from contending that it is not a Math within the meaning of Act II of 1927.

The result is that the appeal is partly allowed, the suit is decreed in so far it claims injunction restraining the levy of contributions from the plaintiff under sections 69 and 70 of Madras Act II of 1927 and from taking any coercive steps in pursuance of any demands against the plaintiff under Act II of 1927, and the suit is dismissed, in so far as it claims injunction restraining the levy of contributions and taking any coercive steps in respect of demands against the plaintiff under Madras Act XIX of 1951. The success being divided, we direct that the parties will pay and bear their own costs throughout, in this Court and in the Courts below.

V.S.

*Appeal allowed in part.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—K. SUBBA RAO, RAGHUBAR DAYAL, J. R. MUDHOLKAR, R. S. BAGHAVAT AND V. RAMASWAMI, JJ.

Amireddi Raja Gopala Rao and others

.. *Appellants\**

*v.*

Amireddi Sitharamamma and others

.. *Respondents.*

*Hindu Law—Brahmin woman whose husband was alive becoming concubine of sudra and having children by him—Avaruddha Stree entitled to maintenance out of paramours estate for herself and her children,—Right to maintenance if destroyed by Hindu Adoptions and Maintenance Act (LXXVIII of 1956) coming into force during pendency of appeal against decree giving maintenance.*

Under the Hindu Law as it stood in 1948 (when the paramour died in the instant case) a married woman who left her husband and lived with her paramour as his permanently kept mistress could claim the status of an *Avaruddha Stree* by remaining faithful to her paramour though the connection was adulterous and was entitled to maintenance from the estate of the paramour so long as she preserved her sexual fidelity to him. *Akku Pralhad v. Ganesh Pralhad*, I.L.R. 1945 Bom. 604, 614 approved. A *Swairini* and other adultress kept in concubinage could claim the status of an *Avaruddha Stree*. The



connection was no doubt immoral, but concubinage itself is immoral yet it was recognised by law for the purpose of founding a claim for maintenance by her and her illegitimate sons. The paramour may be punishable for the offence of adultery, but the concubine is not punishable as abettor of the offence. Whether or not a *Pratiloma* marriage was valid under the old Hindu law a claim for maintenance by an *Avaruddha Stree* cannot be defeated on the ground that she was a Brahmin and her paramour was a *Sudra*.

In the instant case the paramour died in 1948. Suit was instituted by the concubine in December 1949 and decreed in 1954. The Hindu Adoption and Maintenance Act (1956) came into force during the pendency of the appeal against the decree. On the question whether the right to maintenance decreed in favour of the concubine was taken away by the Act.

**Held** Sections 21 and 22 read with section 4 of the Act do not destroy or affect any right of maintenance out of the estate of a deceased Hindu vested on his death before the commencement of the Act under the Hindu Law in force at the time of his death.

Decision of the High Court in (1968) 2 An W R 352 (F B) affirmed.

Appeal from the Judgment and Decree dated 22nd July, 1960, of the Andhra Pradesh High Court in Appeal Suit No 709 of 1954.\*

*A Ranganadham Chetty*, Senior Advocate (*Miss A Vedavali* and *A V Rangam*, Advocates, with him), for Appellants.

*M S K, Sastri* and *M S Narasimhan*, Advocates, for Respondent.

The Judgment of the Court was delivered by

**Bachawat, J**—The first respondent, Seetharamamma, is a Brahmin woman. She was married to one Ramakrishna. During the lifetime of her husband she became the concubine of one Lingayya, a *Sudra* by caste. From 1938 until the death of Lingayya in February, 1948 she was the permanently kept concubine of Lingayya and lived with him. During this period and thereafter, she preserved sexual fidelity to Lingayya. The second, third and fourth respondents are the sons of the first respondent by Lingayya. The husband of the first respondent is still alive. The appellants are the brothers and brothers' sons of Lingayya. Lingayya was separate in estate from his brother and brothers' sons. The parties are residents of Choragudi Bapatala now in Andhra Pradesh and governed by the Mitakshara school of Hindu law. In the plaint, as originally filed, the respondents claimed that they were exclusively entitled to the estate left by Lingayya. The Subordinate Judge and the High Court found that as the first respondent was and continued to be a married woman while she lived with Lingayya and bore him children she was not the lawfully wedded wife of Lingayya and the children born of the union were not his legitimate sons, nor were they *Dasiputras* and as such entitled to his properties. The suit was originally dismissed by the Subordinate Judge, but on appeal, the High Court gave the respondents leave to amend the plaint by making suitable averments for the award of maintenance, and remanded the suit for trial on the question of maintenance. At the subsequent trial on the amended plaint, the Subordinate Judge decreed the respondents' claim for maintenance and consequential reliefs and awarded to them maintenance during their lifetime out of the estate of Lingayya. The Subordinate Judge passed his decree on 20th September, 1954. During the pendency of the appeal preferred by the appellants before the High Court the Hindu Adoptions and Maintenance Act of 1956 (hereinafter referred to as the Act) came into force. The main controversies in the appeal before the High Court were (1) whether the provisions of the Act are retrospective, and (2) whether a married woman who left her husband and lived with another as his permanently kept mistress could be regarded as an *Avaruddha Stree*. In view of the importance of these questions, the appeal was referred to a Full Bench of the High Court. On the first question, the High Court held that the relevant provisions of the Act applied only to the estates of Hindus dying after the commencement of the Act, and that the right of the respondents to maintenance during their lifetime under the Hindu law in force at the time of the death of Lingayya was not affected by the Act. On the second question,

the High Court held that the first respondent was an *Avaruddha Stree* of Lingayya and was entitled to maintenance from his estate, though her husband was alive and the connection with Lingayya was adulterous. The High Court agreed with the Subordinate Judge with regard to quantum of maintenance.

On behalf of the appellants, it is contended that the respondents are not entitled to claim any maintenance from the estate of Lingayya under the Hindu law as it stood prior to the commencement of the Act, because (a) the first respondent is not a *Dasi* and the second, third and fourth respondents are not *Dasiputras* of Lingayya, and this point is concluded by the previous judgment of the High Court, which has now become final between the parties; (b) the husband of the first respondent was and is still alive, and the connection of the first respondent with Lingayya was adulterous during the period of her intimacy with Lingayya and while she bore him children; (c) the first respondent being a brahmin adulteress and Lingayya being a *Sudra*, the connection was *Pratiloma* and illegal.

Now under the Hindu law as it stood before the commencement of the Act, the claim of a *Dasiputra* or the son of a *Dasi*, that is, a Hindu concubine in the continuous and exclusive keeping of the father rested on the express texts of the Mitakshara, Ch. I, S. 12, V. 1, 2 and 3. In the case of *Sudras*, the *Dasiputra* was entitled to a share of the inheritance, and this share was given to him not merely in lieu of maintenance but in recognition of his status as a son, see *Gur Narain Das and another v. Gur Tahal Das and others*<sup>1</sup>. But the illegitimate son of a *Sudra* by his concubine was not entitled to a share of the inheritance if he were the offspring of an incestuous connection, see *Datti Parisi Nayudu v. Datti Bangaru Nayudu*<sup>2</sup>, or if at the time of his conception, the connection was adulterous, see *Rahi and others v. Govind Valad Teja*<sup>3</sup>, *Narayan Bharthi v. Laving Bharthi and others*<sup>4</sup>, *Tukaram v. Dinkar*<sup>5</sup>. Such an illegitimate son could not claim the status of a member of his father's family and could not get a share of the inheritance as a *Dasiputra* under the express texts of the Mitakshara. For this reason, the previous judgment of the High Court rightly held that the second, third and fourth respondents were not *Dasiputra* of Lingayya, and could not claim the inheritance. But the point whether they are entitled to maintenance out of the estate of Lingayya is not concluded by the previous judgment. It is well recognised that independently of the express texts of the Mitakshara, Ch. I, S. 12, V. 3, the illegitimate son of a *Sudra* was entitled to maintenance out of his father's estate though his mother was not a *Dasi* in the strict sense and though he was the result of a causal or adulterous intercourse. It was not essential to his title to maintenance that he should have been born in the house of his father or of a concubine possessing the peculiar status therein, see *Muttuswamy Jagaveera Yettappa Naicker v. Venkateswara Yettappa*<sup>6</sup>. The illegitimate son of a *Sudra* was entitled to maintenance out of his father's estate, though at the time of his conception his mother was a married woman, her husband was alive and her connection with the putative father was adulterous, see *Rahi v. Govind*<sup>3</sup>, *Viraramuthi Udayan v. Singaravelu*<sup>7</sup>, *Subramania Mudaly v. Valu*<sup>8</sup>. According to the Mitakshara school of law, the illegitimate son of a *Sudra* was entitled to maintenance from his father's estate during his lifetime. Under the Hindu Law, as it stood prior to the commencement of the Act, the first second and third respondents were, therefore entitled to maintenance during their lifetime, out of the estate of Lingayya.

The claim of an *Avaruddha Stree* or woman kept in concubinage for maintenance for her lifetime against the estate of her paramour rested on the express text of a Mitakshara, Ch. 2, S. 1, Vs. 27 and 28 read with V. 7. In *Bai Nagubai v. Bai Monghibai*<sup>9</sup>, where the man and the woman were Hindus and the paramour was governed by the law of the Mayuka, Lord Darling said :

1. (1952) S.C.J. 305 : (1952) 2 M.L.J. 251 : 1952 S.C.R. 869, 875.

2. (1869) 4 M.H.C.R. 204.

3. (1875) I.L.R. 1 Bom. 97.

4. (1878) I.L.R. 2 Bom. 140.

5. (1931) 33 Bom.L.R. 289.

6. (1868) 12 M.I.A. 203, 220.

7. (1877) I.L.R. 1 Mad. 306.

8. (1911) 20 M.L.J. 350 : I.L.R. 34 Mad.

68. 9. (1926) I.L.R. 50 Bom. 604, 614.

<sup>1</sup> providing the concubinage be permanent until the death of the paramour and sexual fidelity to him be preserved the right to maintenance is established, although the concubine be kept in the family house of the deceased

The law of the Mitakshara is in agreement with the law of the Mayuka on this point. In the instant case the first respondent being continuously and exclusively in the keeping of Lingayya until his death for about 10 years the concubinage has been found to be permanent. She observed sexual fidelity to Lingayya during his lifetime and after his death has continued to preserve her qualified chastity. In *Akku Pralhad v Ganesh Pralhad*<sup>1</sup> a Full Bench of the Bombay High Court held that a married woman who left her husband and lived with her paramour as his permanently kept mistress could claim the status of an *Avaruddha Stree* by remaining faithful to her paramour though the connection was adulterous and was entitled to maintenance from the estate of the paramour so long as she preserved her sexual fidelity to him. This Full Bench decision overruled the decision in *Anandilal Bhagechand v Chandrabai*<sup>2</sup>, and followed the earlier decisions in *Ahemkire v Umashankar*<sup>3</sup>, and *Ningareddi v Lakshmana*<sup>4</sup>. The decision in *Akku Pralhad v Ganesh Pralhad*<sup>1</sup>, has been subject of strong criticism in Mayne's Hindu Law and Usage 11th Edn Article 683 page 816, edited by Sri Chandrasekhara Aiyar and in a learned Article in *Chinna Mahab Mudali v Nanayappa Goundan*<sup>5</sup> but the Full Bench of the Andhra Pradesh High Court in the instant case found themselves in complete agreement with the Bombay decision. We are of the opinion that the Bombay decision lays down the correct law.

*Avaruddha Stree* as understood by Vijananeswara, includes a *Swairini* or adulteress kept in concubinage. While dealing with the assets of a deceased Hindu not liable to partition Mitakshara Ch I, S 4 V 22, he says, *Swairini* and others who are *Avaruddha* by the father, though even in number, should not be divided among the sons. Colebrook's translation of the passage is as follows: 'But women (adulteresses and others) kept in concubinage by the father must not be shared by the sons, though equal in number'. In his commentary on Yajnavalkya's Verse 290 in *Iyadhara Adhyaya* Chapter 24 on *Stree Sangrahana*, Vijananeswara citing Manu explains *Swairini* as a woman who abandons her own husband and goes to another man of her own *Varna* out of love for him. Thus a *Swairini* and other adulteress kept in concubinage could claim the status of an *Avaruddha Stree*. The connection was no doubt immoral, but concubinage itself is immoral, yet it was recognised by law for the purpose of founding a claim for maintenance by her and her illegitimate sons. The paramour may be punishable for the offence of adultery, but the concubine is not punishable as abettor of the offence.

A concubine was not disqualified from claiming maintenance by reason of the fact that she was a brahmin. The claim of a concubine who was a respectable woman of the brahmin caste and her illegitimate son for maintenance was allowed in *Harigovind Kuari v Dharam Singh*<sup>6</sup>. No doubt, a *Pratiloma* connection is denounced by the Smriti writers and the Commentators, and before the Hindu Marriages Validity Act 1949 (XXI of 1949) *Pratiloma* marriages between a *sudra* male and a brahmin female were declared invalid in *Bai Kashi v Jannadas*<sup>7</sup> and in *Ramchandra Doddappa v Hanamma I. Dodnaik*<sup>8</sup> but even those cases recognise that a brahmin concubine in the exclusive and continuous keeping of a *sudra* until his death was entitled to claim maintenance. We express no opinion on the question whether a *Pratiloma* marriage was valid under the old Hindu law but we are satisfied that the claim of the respondents for maintenance cannot be defeated on the ground that the first respondent was a brahmin and her paramour was a *sudra*.

We are satisfied that the respondents were entitled to maintenance during their lives out of the estate of Lingayya under the Hindu law as it stood in 1948

1 I.L.R. 1915 Bom. 216 (F.B.)

2 (1921) I.L.R. 43 Bom. 203

3 (1873) 10 Bom. I.C.R. 331

4 (1901) I.L.R. 26 Bom. 163

5 (1916) I.M.L.J. (N.I.C.) 1

6 (1881) I.L.R. 6 All. 379

7 (1912) 14 Bom.L.R. 517

8 (1936) I.L.R. 60 Bom. 72

when Lingayya died, in December, 1949, when the suit was instituted and also in 1954, when the suit was decreed by the Subordinate Judge. The question is whether this right is taken away by the Hindu Adoptions and Maintenance Act, 1956, which came into force during the pendency of the appeal to the High Court. The Act is intended to amend and codify the law relating to adoptions and maintenance among Hindus. Section 4 of the Act is as follows :

"4. Save as otherwise expressly provided in this Act,—

(a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act ;

(b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act."

Section 21 defines "dependants" as meaning certain relatives of the deceased, and under sub-clause (viii), includes "his or her minor illegitimate son, so long as he remains a minor". A concubine is not one of the persons within the definition of "dependants" given in section 21, and an illegitimate son is not a dependant when he ceases to be a minor. Section 22 reads thus:

"22. (1) Subject to the provisions of sub-section (2), the heirs of a deceased Hindu are bound to maintain the dependents of the deceased out of the estate inherited by them from the deceased.

(2) Where a dependant has not obtained, by testamentary or intestate succession, any share in the estate of a Hindu dying after the commencement of this Act, the dependant shall be entitled, subject to the provisions of this Act, to maintenance from those who take the estate.

(3) The liability of each of the persons who takes the estate shall be in proportion to the value of the share or part of the estate taken by him or her.

(4) Notwithstanding anything contained in sub-section (2) or sub-section (3), no person who is himself or herself a dependant shall be liable to contribute to the maintenance of the others, if he or she has obtained a share or part the value of which is, or would, if the liability to contribute were enforced, become less than what would be awarded to him or her by way of maintenance under this Act."

Sub-section (1) of section 22 imposes upon the heirs of a deceased Hindu the liability to maintain the dependants of the deceased defined in section 21 out of the estate inherited by them from the deceased, but this liability is subject to the provisions of sub-section (2), under which only a dependant who has not obtained by testamentary or intestate succession, any share in the estate of a Hindu dying after the commencement of the Act is entitled, subject to the provisions of the Act, to maintenance. Specific provisions are thus made in section 22 with regard to maintenance of the dependants defined in section 21 out of the estate of the deceased Hindu, and in view of section 4, the Hindu law in force immediately before the commencement of the Act ceases to have effect after the commencement of the Act with respect to matters for which provision is so made. In terms sections 21 and 22 are prospective. Where the Act is intended to be retrospective, it expressly says so. Thus, section 18 provides for maintenance of a Hindu wife, whether married before or after the commencement of the Act, by her husband, section 19 provides for the maintenance of a Hindu wife, whether married before or after the commencement of the Act, by her father-in-law, after the death of her husband, and section 25 provides for alteration of the amount of maintenance whether fixed by a decree of Court or by agreement either before or after the commencement of the Act. Now, before the Act came into force, rights of maintenance out of the estate of a Hindu dying before the commencement of the Act were acquired and the corresponding liability to pay the maintenance was incurred under the Hindu law in force at the time of his death. It is a well-recognised rule that a statute should be interpreted, if possible, so as to respect vested rights, and such a construction should never be adopted if the words are open to another construction. See Craies on Statute Law, 6th Edition (1963), page 397. We think that sections 21 and 22 read with section 4 do not destroy or affect any right of maintenance out of the estate of a deceased Hindu vested on his death before the commencement of the Act under the Hindu law in force at the time of his death.

On the death of Lingayya the first respondent as his concubine and the second third and fourth respondents as her illegitimate sons had a vested right of maintenance during their lives out of the estate of Lingayya. This right and the corresponding liability of the appellants to pay maintenance are not affected by sections 21 and 22 of the Act. The continuing claim of the respondents during their lifetime springs out of the original right vested in them on the death of Lingayya and is not founded on any right arising after the commencement of the Act.

In *S. Kameswaramma v. Subramanyam*<sup>1</sup> the plaintiff's husband had died in the year 1916 and the plaintiff had entered into a compromise in 1924 fixing her maintenance at Rs. 240 per year and providing that the rate of maintenance shall not be increased or reduced. The question arose whether in spite of this agreement the plaintiff could claim increased maintenance in view of section 25 of the Hindu Adoptions and Maintenance Act 1956. It was held that in spite of the aforesaid term of the compromise she was entitled to claim increased maintenance under section 25. This conclusion follows from the plain words of section 25 under which the amount of maintenance whether fixed by decree or agreement either before or after the commencement of the Act may be altered subsequently. The decision was therefore plainly right. No doubt, there are broad observations in that case to the effect that the right to maintenance is a recurring right and the liability to maintenance after the Act came into force is imposed by section 22 and there is no reason to exclude widows of persons who died before the Act from the operation of section 22. Those observations were not necessary for the purpose of that case because the widow in that case was clearly entitled to maintenance from the estate of her deceased husband dying in 1916 under the Hindu law as it stood then independently of section 21 and 22 of the Act and in spite of the compromise fixing the maintenance before the commencement of the Act the widow could in view of section 25 claim alteration of the amount of the maintenance. The decision cannot be regarded as an authority for the proposition that sections 21 and 22 of the Act affect rights already vested before the commencement of the Act. We therefore hold that the claim of the respondent to maintenance for their lives is not affected by the Act.

We see no reason to interfere with the concurrent finding of the Courts below with regard to the quantum of maintenance.

In the result, the appeal is dismissed with costs.

K S

*Appeal dismissed*

## THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT — P. B. GAJENDRAGADKAR *Chief Justice* RAOHUBAR DAYAL AND V. RAMAIAH JJ

The State of Bombay (now Maharashtra)

*Appellants\**

*v.*  
Nurul Latif Khan

*Respondent*

*Constitution of India (1950) Article 311—Right of charged officer to be given opportunity to lead oral evidence if he desires—Enquiry officer if can say that having regard to the charges he would not hold an oral enquiry—Civil Services (Classification Control and Appeal) Rule rule 55—Scope*

The requirement in Rule 55 of the Civil Services (Classification Control and Appeals) Rules that an oral enquiry shall be held if the authority concerned so directs or if the charge-sheeted officer so desires is mandatory. Indeed this requirement is plainly based upon considerations of natural justice and fair play. If the charge-sheeted officer wants to lead his own evidence in support of his plea, it is obviously essential that he should be given an opportunity to lead such evidence. The oral enquiry which the Enquiry Officer is bound to hold can well be regulated by him in his discretion. He can check and control any irrelevant cross-examination of the departmental witnesses and also refuse to examine such witnesses whose evidence may appear to the Enquiry Officer to be thoroughly irrelevant.

<sup>1</sup> (1959) 1 A.W.R. 12 A.I.R. 1959 Andh. Pra. 269

But in doing so he will have to record his special and sufficient reasons. But it would be impossible to accept the argument that if the charge-sheeted officer wants to lead oral evidence the Enquiry Officer can say that having regard to the charges framed against the officer, he would not hold an oral enquiry. As in the instant case, the charge-sheeted officer was not allowed to lead oral evidence which he desired, he has not been given a reasonable opportunity to defend himself within the meaning of Article 311 (2) of the Constitution. This introduces a fatal infirmity in the whole enquiry.

Appeal from the Judgment and Decree dated 11th September, 1961, of the Bombay High Court (Nagpur Bench) at Nagpur in Appeal No. 58 of 1956 from Original Decree.

*C. K. Daphtary*, Attorney General for India (*M. S. K. Sastri* and *R. H. Dhebar*, Advocates, with him), for Appellant.

*C. B. Agarwala*, Senior Advocate (*A. G. Ratnaparkhi*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

*Gajendragadkar, C.J.*—The short question of law which arises in this appeal<sup>1</sup> is whether the appellant, the State of Bombay (now Maharashtra), shows that its predecessor State of Madhya Pradesh (hereinafter) called the Government had given a reasonable opportunity to the respondent, Nurul Latif Khan, to defend himself before it passed the final order on 6th June, 1952, compulsorily retiring him under Article 353 of the Civil Service Regulations. By this order, the respondent was compulsorily retired and in relaxation of Article 353, the Government was pleased to allow the respondent to draw a compassionate allowance equal to the pension which would have been admissible to him had he been invalidated.

This order was challenged by the respondent by filing a suit in the Court of the first Additional District Judge at Nagpur. In his plaint, the respondent alleged that the impugned order whereby he was compulsorily retired, was invalid and he claimed a declaration that it was *ultra vires* and inoperative. He also asked for a declaration that he was entitled to be restored to the post which he held on 6th July, 1950, and that he should be given all pay, allowances, increments and promotions to which he would have been entitled if he had been permitted to continue in service. In the result, the respondent asked for a decree for Rs. 62,237 with interest at 6 per cent per annum from the date of the suit till realisation.

This claim was resisted by the appellant on several grounds. The principal ground on which the appellant challenged the respondent's claim, however, was that he had been given a reasonable opportunity to defend himself, and so, the impugned order was perfectly valid and legal. Several other pleas were also raised by the appellant. On these pleas, the learned trial Judge framed appropriate issues. The issue with which we are concerned in the present appeal, however, centred round the question as to whether the Constitutional provision prescribed by Article 311 affording protection to the respondent had been contravened. The trial Judge made a finding against the respondent on this issue. He also recorded his findings on the other issues with which we are not directly concerned in the present appeal. In regard to the money claim made by the respondent, the learned trial Judge made a finding that in case he was held entitled to such a relief, decree for Rs. 37,237 may have to be passed in his favour. In view of his conclusion that the impugned order was valid, no question arose for making such a decree in favour of the respondent. The respondent's suit, therefore, failed and was dismissed.

The respondent then took the matter in appeal before the High Court of Judicature at Bombay, Nagpur Bench. The High Court has, in substance, held that the constitutional provisions prescribed by Article 311 have not been complied with by the appellant before it passed the impugned order against the respondent. It has found that the departmental enquiry which was held suffered from the serious infirmity that the enquiry officer did not hold an oral enquiry and did not allow an opportunity to the respondent to lead his oral evidence. It has also held that second notice served by the appellant on the respondent calling upon

him to show cause why the report made by the enquiry officer should not be accepted and appropriate punishment should not be inflicted on him, was defective, and that also made the impugned order invalid. The High Court appears to have taken the view that the impugned order does not show that the appellant had taken into account the explanation offered by the respondent in response to the second notice issued by the appellant. As a result of these findings, the High Court has reversed the conclusion of the trial Court on the main question and has found that the impugned order is invalid and inoperative. On that view, the High Court considered the money claim made by the respondent, and it confirmed the finding of the trial Court that the respondent would be entitled to a decree for Rs. 37,237. In fact, the alternative finding recorded by the trial Court in respect of the amount to which the respondent would be entitled in case he succeeded in challenging the validity of the impugned order was not questioned before the High Court. In the result, the High Court allowed the appeal and passed a money decree for Rs. 37,237 in favour of the respondent in terms of prayer (a) of paragraph 31 of the plaint. The appellant then applied for and obtained a certificate from the High Court and it is with the said certificate that it has brought the present appeal before this Court. That is how the main question which falls for our decision is whether the constitutional provision prescribed by Article 311 has been complied with by the appellant before it passed the impugned order.

At this stage, it may be relevant to refer to some material facts. The respondent was appointed as Extra Assistant Commissioner in 1926 and since then he had been holding various offices in the State service of the then Madhya Pradesh Government. In 1950, he was holding the post of a Treasury Officer at Nagpur. It appears that privilege leave for over a year was due to him and he had applied for four months privilege leave. On 12th June, 1950 Government informed him that his request for leave was rejected and he was told that no further application for leave would be entertained in future. On 7th July, 1950 the respondent proceeded on casual leave for two days and on 8th July, 1950 he renewed his application for four months leave on medical grounds. This application was accompanied by a certificate given by Dr. Dange, Government, therefore, decided to constitute a Medical Board for examining the respondent in order to decide whether leave on medical grounds should be granted to him. Accordingly, the respondent appeared before a Special Medical Board on 22nd July, 1950. The Medical Board, however, could not come to a decision as to whether the respondent should be granted leave on medical grounds for four months. It recommended that the respondent should get himself admitted in the Mayo Hospital, Nagpur, for observation and investigation. In accordance with this report Government asked the respondent to get himself admitted in the Mayo Hospital in time, so that the Board could examine him on 8th August, 1950. The respondent refused to go to the Mayo Hospital and pressed that he should be allowed to go to Calcutta to receive medical treatment from experts. It appears that on 26th July 1950 the respondent received a telegram from Raipur stating that his daughter was dangerously ill there. He, therefore, made another application on the same day requesting for ten days leave to enable him to go to Raipur and see his ailing daughter. On 31st July, 1950, Government granted the respondent's request. Accordingly, the respondent went to Raipur. From Raipur he renewed his application for four months leave on Medical grounds and produced certificates from Dr. Bhalariao and Dr. Kashyap. That led to a lengthy correspondence between the respondent and the Government which shows that Government insisted on his appearing before the Medical Board and the respondent was not prepared to go to Nagpur because he alleged that he was seriously ill and could not undertake a journey to Nagpur. Ultimately, on 9th September, 1950 Government called upon the respondent to resume his duties within three days from the receipt of the said letter failing which he was told that he would be suspended and a departmental enquiry would be started against him. On 4th October, 1950, the respondent wrote a lengthy reply setting forth his contentions in detail. Since he did not resume duties, Government decided to suspend him and start a departmental enquiry.

against him. Mr. S. N. Mehta, I.C.S., was accordingly appointed to hold the enquiry. On 29th November, 1950, Mr. Mehta wrote to the respondent that Government had directed him to conduct the departmental enquiry, and called upon the respondent to attend his office on 7th December, 1950, at 11-00 A.M. The respondent, however, did not appear before him and wrote to Mr. Mehta that owing to his illness, he was unable to appear before him. He again pleaded that he was seriously ill.

On 15th January, 1951, Mr. Mehta served the respondent with a charge-sheet. Three charges were framed against him. The first charge was that he had deliberately disobeyed the orders of Government when he was asked to get himself admitted in the Mayo Hospital for observation and investigation. The second charge was that he had failed to report for duty even though no leave was sanctioned to him by Government and he was specifically ordered by Government to report for duty. The third charge was that he had persistently disobeyed the orders of Government and he had thereby shown himself unfit to continue as a member of the State Civil Service. Material allegations on which reliance was placed against the respondent in support of these charges were also specified under the respective charges.

The respondent was, however, not prepared to appear before Mr. Mehta and he raised several technical contentions. Ultimately, he sent his written statement and denied all the charges. His case appears to have been that he had not deliberately disobeyed any of the orders issued by Government. In regard to his getting admitted in the Mayo Hospital he seems to have taken the plea that when he was allowed to go on casual leave to see his ailing daughter at Raipur, it was clear that he could not have got himself admitted in the Mayo Hospital so as to enable the Medical Board to examine him on 8th August, 1950. In respect of the charge that he had persistently refused to obey the orders of Government, his case was that he was dangerously ill and that he genuinely apprehended that if he undertook a journey to resume his duty, he might even collapse. He requested the enquiry officer to allow him to appear by a lawyer whom he would instruct to cross-examine the witnesses whom the Government would examine against him. He also stated that he wanted to give evidence of his own doctors who would depose to his ailing condition at the relevant time.

It appears that Mr. Mehta wanted to accommodate the respondent as much as he could and when he found that the respondent was not appearing in person before him, he in fact fixed a date for hearing at Raipur on 21st September, 1951, where he happened to be camping. On that date, the respondent appeared before Mr. Mehta and Mr. Mehta made a note as to what transpired on that date. The note shows that

"the whole case was discussed with the respondent. His plea was that he should be allowed to appear through a Counsel, but it was explained to him in detail that as far as the case can be seen from Government side at present, it does not involve the taking of oral evidence. He agreed that he would not press for this facility. He would, however, like to give a detailed answer to the charge-sheet. He also undertook to appear in person regularly in future."

Thereafter, Mr. Mehta required the respondent to file his detailed written statement, and in fact, the respondent did file his detailed written statement containing the pleas to which we have already referred. On 8th November, 1951, Mr. Mehta wrote to the respondent that he would be glad to hear him in person in case he wished to make an oral statement on 20th November, 1951, and when the respondent did not appear on the said date, Mr. Mehta proceeded to examine the documentary evidence showing the failure of the respondent to comply with the orders issued by Government and made his report on 24th November, 1951. He found that the three charges framed against the respondent were proved. In his report, Mr. Mehta observed that

"the conduct of the respondent and the language used by him from time to time in his communication discloses an attitude of disobedience and insubordination which no Government can tolerate from its subordinate officers."

We may incidentally observe that the comment thus made by Mr. Mehta in regard to the communications addressed by the respondent to him appears to us to



be fully justified ; but, in our opinion, this aspect of the matter cannot have any material bearing on the question with which we are concerned. The validity of the impugned order must be judged objectively without considering the impropriety of the language used by the respondent or the reluctance shown by him to appear before Mr. Mehta.

In his report, Mr. Mehta has also observed that when the respondent met him, he explained to him that the case did not involve recording of any oral evidence as it was based on documents only. Mr. Mehta adds that according to the impression he got at that time, the respondent was satisfied that in the circumstances, the assistance of a Counsel was unnecessary. It is, however, plain from the several letters written by the respondent to Mr. Mehta that he was insisting upon an oral enquiry and that he wanted to examine his doctors to show that he was so ill at the relevant time that he could not have resumed his duties. On 2nd March, 1951, the respondent wrote to Mr. Mehta stating, *inter alia* that he wished to put in the witness-box a few high-ranking Government officers and the doctors whom he had consulted about his illness. Earlier on 20th January, 1951, he had written to Mr. Mehta requesting him to conduct an oral enquiry as laid down in paragraph 8 (iv) G. B. Circular 13. Similarly, on 23rd April, 1951, he again informed Mr. Mehta that in his opinion the institution of the departmental enquiry after suspending him was illegal and had caused him grave injury, and he added that oral and documentary evidence will be produced in defence.

It does appear that Mr. Mehta explained to the respondent that so far as Government was concerned, it rested its case merely on documents and did not think it necessary to examine any witnesses, and thereupon the respondent agreed that he need not have the facility of the assistance of a lawyer. But it is clear from the remarks made by Mr. Mehta in the order sheet on 21st September, 1951, and the observations made by him in his report that the only point on which the respondent agreed with Mr. Mehta was that he need not be allowed the assistance of the lawyer in the departmental enquiry. We have carefully examined the record in this case and we see no justification for assuming that the respondent at any time gave up his demand for an oral enquiry in the sense that he should be given permission to cite his doctors in support of his plea that his failure to resume his duties was due to his ill-health. The charge against him was that he had deliberately disobeyed the Government orders, and it is conceivable that this charge could have been met by the respondent by showing that though he disobeyed the orders, the disobedience was in no sense deliberate because his doctors had advised him to lie in bed ; and thus considered, his desire to lead medical evidence cannot be treated as a mere subterfuge to prolong the enquiry. It is true that the respondent did not give a list of his witnesses ; but he had named his doctors in his communications to Mr. Mehta, and in fact Mr. Mehta never fixed any date for taking the evidence of the witnesses whom the respondent wanted to examine. If Mr. Mehta had told the respondent that he would take the evidence of his witnesses on a specified date and the respondent had failed to appear on the said date with his witnesses, it would have been an entirely different matter. Therefore, the position is that Mr. Mehta did not hold an oral enquiry and did not give an opportunity to the respondent to examine his witnesses and so, the question which arises for our decision is - does the failure of Mr. Mehta to hold an oral enquiry amount to a failure to give a reasonable opportunity to the respondent within the meaning of Article 311.

The requirements of Article 311 (2) have been considered by this Court on several occasions. At the relevant time, Article 311 (2) provided that no person to whom Article 311 applies shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. It is common ground that the impugned order of compulsory retirement attracts the provisions of Article 311 (2). If it appears that the relevant statutory rule regulating the departmental enquiry which was held against the respondent made it obligatory on the enquiry officer to hold an oral enquiry if the respondent so demanded, then there would be no doubt that the failure of the

enquiry officer to hold such an oral enquiry would introduce a serious infirmity in the enquiry, and would plainly amount to the failure of the appellant to give a reasonable opportunity to the respondent. This position is not disputed by the learned Attorney-General and is indeed well settled. So, the narrow question to which we must address ourselves is whether it was obligatory on Mr. Mehta to hold an oral enquiry and give a reasonable opportunity to the respondent to lead oral evidence and examine his doctors. We will assume for the purpose of this appeal that in a given cause, Government would be justified in placing its case against the charge-sheeted officer only on documents and may be under no obligation to examine any witnesses, though we may incidentally observe that even in such cases, if the officer, desires that the persons whose reports or orders are being relied upon against him should be offered for cross-examination, it may have to be considered whether such an opportunity ought not to be given to the officer; but that aspect of the matter we will not consider in the present appeal. Therefore, even if it is assumed that Government could dispense with the examination of witnesses in support of the charges framed against the respondent, does the relevant rule make it obligatory on the Enquiry Officer to hold an oral enquiry and give the respondent a chance to examine his witnesses or not?

This question falls to be considered on the construction of rule 55 of the Civil Services (Classification, Control and Appeal) Rules. This rule reads thus :

"Without prejudice to the provisions of the Public Servants Inquiries Act, 1850, no order of dismissal, removal or reduction shall be passed on a member of a service (other than an order based on facts which have led to the conviction in a Criminal Court or by a Court-martial) unless he has been informed in writing of the grounds on which it is proposed to take action, and has been afforded an adequate opportunity of defending himself. The grounds on which it is proposed to take action shall be reduced to the form of a definite charge or charges, which shall be communicated to the person charged together with a statement of the allegations on which each charge is based and of any other circumstances which it is proposed to take into consideration in passing orders on the case. He shall be required, within a reasonable time, to put in a written statement of his defence and to state whether he desires to be heard in person. If he so desires or if the authority concerned so direct, an oral enquiry shall be held. At that enquiry oral evidence shall be heard as to such of the allegations as are not admitted, and the person charged shall be entitled to cross-examine the witnesses, to give evidence in person and to have such witnesses called, as he may wish, provided that the officer conducting the enquiry may, for special and sufficient reason to be recorded in writing refuse to call a witness. The proceedings shall contain a sufficient record of the evidence and a statement of the findings and the grounds thereof."

It appears that the Government of Madhya Pradesh had issued a Circular explaining this Rule. The Circular contained rule 8 which is relevant. It provides that

"particular attention is invited to the provisions regarding oral enquiry. In case the person charged desires that an oral enquiry should be held, the authority holding the departmental enquiry has no option to refuse it".

The High Court seems to have based its conclusion substantially, if not entirely, on this rule. We do not propose to adopt that course. The rule may be no more than a circular issued by Government and we do not propose to examine the question as to whether it has the force of a statutory rule. Our decision would, therefore, be based on the construction of rule 55 of the Civil Services Rules which admittedly applied and which admittedly is a statutory rule.

The relevant clause in this Rule provides that the officer charge-sheeted shall be required within a reasonable time to put in a written statement of his defence and to state whether he desires to be heard in person. This clause has been complied with in the present proceedings. Mr. Mehta gave notice to the respondent to appear before him in person on the 20th November, 1951 and the respondent did not appear on that date. It is the next clause on which the decision of the present appeal depends. This clause lays down that if he, that is to say the charge-sheeted officer, so desires or if the authority concerned so directs, an oral enquiry shall be held. In our opinion it is plain that the requirement that an oral enquiry shall be held if the authority concerned so directs, or if the charge-sheeted officer so desires is mandatory. Indeed, this requirement is plainly based upon considerations of natural justice and fairplay. If the charge-sheeted officer wants to lead his own evidence in support of his plea, it is obviously essential that he should be given an opportunity to lead such evidence

Therefore, we feel no hesitation in holding that once the respondent expressed his desire to Mr Mehta that he wanted to lead evidence in support of his plea that his alleged disobedience of the Government orders was not deliberate, it was obligatory on Mr Mehta to have fixed a date for recording such oral evidence and give due intimation to the respondent in that behalf.

It is true that the oral enquiry which the Enquiry Officer is bound to hold can well be regulated by him in his discretion. If the charge sheeted officer starts cross-examining the departmental witnesses in an irrelevant manner, such cross-examination can be checked and controlled. If the officer desires to examine witnesses whose evidence may appear to the Enquiry Officer to be thoroughly irrelevant the Enquiry Officer may refuse to examine such witnesses, but in doing so, he will have to record his special and sufficient reasons. In other words, the right given to the charge sheeted officer to cross-examine the departmental witnesses or examine his own witnesses can be legitimately examined and controlled by the Enquiry Officer, he would be justified in conducting the enquiry in such a way that its proceedings are not allowed to be unduly or deliberately prolonged. But, in our opinion, it would be impossible to accept the argument that if the charge sheeted officer wants to lead oral evidence the Enquiry Officer cannot have regard to the charges framed against the officer; he would not hold any oral enquiry. In the present case, the witnesses whom the respondent wanted to examine would undoubtedly have given relevant evidence. If the doctors who treated the respondent had come and told the Enquiry Officer that the condition of the respondent was so bad that he could not resume work that undoubtedly would have been a relevant and material fact to consider in deciding whether the charges framed against the respondent were proved. Even if we disapprove of the attitude adopted by the respondent in the course of the enquiry and condemn him for using extravagant words and making unreasonable contentions in his communication to the Enquiry Officer, the fact still remains that he wanted to examine his doctors and though he intimated to Mr Mehta that he desired to examine his doctors, Mr Mehta failed to give him an opportunity to do so. That, in our opinion, introduces a fatal infirmity in the whole enquiry which means that the respondent has not been given a reasonable opportunity to defend himself within the meaning of Article 311 (2). On that view of the matter, it is unnecessary to consider whether the High Court was right in its other conclusion that the second notice served by the appellant on the respondent was defective and that the final order was also defective inasmuch as it did not appear that the appellant had taken into account the representation made by the respondent.

It is not disputed by the learned Attorney General that if we hold that the enquiry conducted by Mr Mehta contravened the mandatory provision of rule 53, the decision of the High Court could be sustained on that ground alone.

In the result, the appeal fails and is dismissed with costs.

A S

*Appeal dismissed*

## THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT — H. SUDHA RAO, RAGHUBAR DAYAL, J. R. MUDHOLKAR, R. S. BAGHAWAT, A. D. V. RAMASWAMI, JJ.

The State of Uttar Pradesh and others

*Appellants\**

Srinarayan

*Respondent*

*C. I. Zamin Dars Abolition and Land Ceiling Act (I of 1951), section 6 (d) and rule B-A of the Rules — Commutation bonds issued by the State Government as to the mortgage charges — If should be accepted in payment of arrears and encumbrances due from them.*

*Under section 6 (d) of rule B-A of the Rules under U.P. Zamin Dars Abolition and Land Reforms Act provide that the commutation bonds are to be accepted in payment or can be accepted in payment.*

ment of tax on agricultural income. The fact that the Bonds are negotiable does not make them legal tender and does not make it obligatory on anyone, including Government, to accept them in payment of any dues. The only result of their being treated as negotiable instruments is that the owner of the Bonds can transfer them to any person who is agreeable to purchase them. When the compensation payable to an intermediary has been paid in the form of cash or bonds, that compensation ceases to be payable and it cannot be said that the amount due for tax should have been deducted from the interim compensation.

Appeal by Special Leave from the Judgment and Order, dated 8th April, 1960 of the Allahabad High Court in Civil Misc. Writ No. 2650 of 1956.

*C. B. Agarwala*, Senior Advocate (*O. P. Rana*, Advocate, with him), for Appellant.

*Yogeshwar Prasad*, *Hardev Singh* and *M. V. Goswami*, Advocates, for Respondents.

The Judgment of the Court was delivered by

*Raghubar Dayal, J.*—This appeal, by Special Leave, raises the question whether Zamindari Abolition Compensation Bonds (shortly termed Bonds) issued by the U.P. Government to intermediaries in payment of compensation payable on the basis of their rights under the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (U.P. Act I of 1951), hereinafter referred to as the Act, have to be accepted by the appropriate authorities in payment of the agricultural income-tax due from them.

The facts leading to the appeal, in brief, are that the respondent, an ex-Zamindar, was assessed to agricultural income-tax in the assessment year 1360 F corresponding to 1952-53, on the basis of the agricultural income accruing in the previous year 1359 F corresponding to 1951-52. He did not pay the assessed tax and was further assessed to a penalty. In the result, Rs. 868 were to be paid by him for tax plus penalty.

The respondent's writ petition contending that he was not liable to pay tax was dismissed by the High Court. Thereafter, the agricultural income-tax authorities took out proceedings for the realisation of the amount due from him. On 24th July, 1956, the respondent presented an application to the Agricultural Income-tax Assessing Officer, Allahabad, stating that he had no ready cash to pay the dues and that he was therefore depositing Bonds of the value of Rs. 850 and Rs. 18 in cash and praying that the Bonds be accepted in payment of tax dues. This application was rejected by an order stating that there was no rule for the acceptance of those Bonds and that they be returned to the applicant.

On 1st August, 1956, the respondent made a similar application to the Collector complaining that the Assessing Officer had no valid reason to refuse to take the Bonds when the Bonds were negotiable instruments. This application was also rejected on a report of the Assessing Officer that the Bonds were not accepted in the settlement of agricultural income-tax dues; that they were not negotiable and that there was no provision in the Act for their acceptance.

Thereafter, the respondent presented a writ petition to the High Court of Allahabad praying for the issue of a writ of *certiorari* quashing the order of the Assessing Officer and the Collector, Allahabad, for the issue of a writ of *mandamus* directing them to accept the Bonds in lieu of the tax dues and, in any case, to deduct the amount from the rehabilitation grant due to the petitioner and for the issue of a writ of prohibition directing the opposite parties from adopting coercive measures for the realisation of the tax due from the petitioner. The grounds mentioned in support of the prayers were that the Bonds were negotiable instruments and therefore refusal to accept them in payment of agricultural income-tax dues was illegal, that they, having been issued by Government, could not be subsequently refused they being perfectly valid legal tender and that in view of rule 8-A of the Rules made under the Act the amount due for tax should have been deducted from the interim compensation.

The counter affidavit filed by the Naib-Tehsildar Agricultural Income-tax Officer, Allahabad, on behalf of the State, stated that the respondent was assessed

to agricultural income tax in the assesment year commencing from 1st July, 1952 on the income derived in the previous year commencing from 1st July, 1951, that the tax had to be paid in four instalments and in default of payment a penalty of Rs 43 was imposed for each default in payment of the four instalments and that the Bonds could not be accepted towards the tax due under section 6 (d) of the Act read with rule 48 of the Rules as the tax had fallen due in 1360 F, corresponding to 1st July, 1952 to 30th June, 1953

The High Court held that the orders of the Agricultural Income tax Assessing Officer and the Collector were wrong as the ground for refusing to accept the Bonds in payment of the tax on the ground that there was no rule or statutory provision for their acceptance was incorrect and appeared to have been given in complete ignorance of the provisions of law. Reference was made to the provisions of section 6 (d) of the Act and rule 8 A. The High Court was of the opinion that these have been completely ignored by the two officers. It therefore thought that the orders were liable to be quashed and that adequate relief would be available to the respondent if a direction was given to the Collector to decide his application dated 1st August, 1956, in accordance with law. The High Court therefore quashed the order of the Collector dated 24th August, 1956 and directed him to decide the respondent's application afresh in accordance with law as indicated above.

The appellant thereafter obtained Special Leave from this Court and appealed against the order of the High Court dated 8th April 1960.

The main contention for the appellant before us is that neither section 6 (d) of the Act nor rule 8 A provides that Bonds can be accepted in payment of agricultural income tax and that therefore the order of the Collector dated 24th August, 1956, was correct. For the respondent it is urged that rule 8 A makes it mandatory for the Agricultural Income tax Officer to realise the agricultural income tax due from the compensation payable and that compensation continues to be payable till the Bonds are actually encashed.

Section 6 (d) of the Act, as originally enacted, did not provide, among the consequences of the vesting of the estate in the State, that arrears on account of agricultural income tax might be realised by deducting the amount from the compensation money payable to the intermediary under Chapter III. An amendment was made in this clause (d) by section 3 of U.P. Act XVI of 1953, with retrospective effect from 1st July, 1952, and the relevant portion of the provision after amendment reads thus:

"an arrear of revenue or an arrear on account of tax on agricultural income assessed under the U.P. Agricultural Income tax Act 1918 for any period prior to the date of vesting shall continue to be recoverable from such intermediary and may without prejudice to any other mode of recovery be realised by deducting the amount from the compensation money payable to such intermediary under Chapter III,

Rule 8 A was added to the Rules by Notification No 3266/I A to 56 1954, dated 17th August, 1954 and its relevant portions read:

"8-A. Without prejudice to the right of the State Government to recover the dues mentioned below by such other means as may be open to it under law:

(1) all arrears of land revenue in respect of the estates which have vested in the State Government as a result of the notification under section 4 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 (I of 1951) and of tax on agricultural income assessed under the U.P. Agricultural Income-tax Act 1918 (U.P. Act III of 1919) due from an intermediary for any period prior to the date of vesting shall be realised

(a) in the case of an intermediary who was assessed to land revenue of Rs 10 000 or more from the amount of interim compensation due to him and

(b) in the case of an intermediary who was assessed to a land revenue of less than Rs. 10 000 per annum by deduction from the amount of compensation payable to him.

It is clear from the above provisions that neither section 6 (d) nor rule 8 A provide that Bonds must or can be accepted in payment of tax on agricultural income.

It has been held by this Court in *Collector of Sultanpur v. Raja Jagdish Prasad Sahi*<sup>1</sup>, that the provisions of section 6 (d) of the Act would apply to arrears on account

of agricultural income-tax assessed in 1360 F on the basis of agricultural income during the year 1359 F and that the provisions of rule 8-A are mandatory.

It is not urged for the appellant that rule 8-A is inconsistent with the provisions of section 6 (d) which provides that arrears of tax may be realised from the compensation payable and therefore appears to give a discretion to the authorities to realise the arrears of tax from the compensation payable.

We do not agree with the contention for the respondent that the compensation payable to the intermediary continues to remain payable even after the Compensation Bonds had been delivered to him. Section 68 of the Act provides that the compensation under the Act shall be payable in cash or in bonds or partly in cash and partly in bonds as may be prescribed. It is clear therefore that the delivery of Bonds to the intermediary is in payment of the compensation. The claim for compensation is thus satisfied when the compensation has been paid in accordance with the provisions of section 68. This is also clear from the relevant rules for the payment of compensation.

Rule 62, as it stood prior to 29th November, 1956, provided that the compensation would be paid in negotiable bonds which would be described as Zamindari Abolition Compensation Bonds. Rule 63 as it then stood provided that the Bonds would be issued in specified denominations and would bear interest at the specified rate on the principal that had become payable calculated from the date of vesting. Rules 64 provided that interest together with the principal of a Bond would be paid in equated annual instalments except for the last, as described in Appendix IV during the period of 40 years beginning from the date of vesting, provided that any Bond might be redeemed at an earlier date at the option of the Government. Rule 65 provided that the instalments due on a Bond from the date of its enforcement would be payable on presentation from and after 1st July next after the delivery of the Bond to the intermediary.

These rules show that the compensation does not remain payable after the delivery of the Bonds and that the Bonds, could not be cashed before the due date for their encashment.

The fact that the Bonds are negotiable does not make them legal tender and does not make it obligatory on anyone, including Government, to accept them in payment of any dues. The only result of their being treated as negotiable instruments is that the owner of the Bonds can transfer them to any person who is agreeable to purchase them.

When the compensation payable to an intermediary has been paid in the form of cash or Bonds, that compensation ceases to be payable. Section 6 (d) of the Act and rule 8-A of the Rules do not, as already stated, provide for the receipt of agricultural income-tax in the form of Bonds.

We are therefore of opinion that the Collector cannot be said to be in error in not accepting the Bonds which had been delivered and which were not even cashable at the time, in payment of the arrears of agricultural income-tax payable under the Agricultural Income-tax Act.

We accordingly allow the appeal, set aside the order of the High Court and restore that of the Collector dated 24th August, 1956. The respondent will pay the costs of the appeal to the Appellants.

K.S.

*Appeal allowed.*

## THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT — P B GAJENDRAGADKAR, *Chief Justice*, RAGHUBAR DAYAL AND V RAMASWAMI, JJ

Nand Kishore Saraf

Appellant\*

The State of Rajasthan and another

Respondents

*Rajasthan Minor Mineral Concession Rules Rule 36—Auction for grant of royalty collection contract—Government bound to accept highest bid and confirm contract—Discretion of Government to relax the Rules—Rule 59**Constitution of India (1950) Article 226—Period of unexpired contract coming to end after a very short time from date of order—Writ will not be issued to cancel order of Government granting the contract*

Though the Government usually accepts the highest bid there is nothing in rule 36 of the Rajasthan Minor Mineral Concession Rules which may lead to the conclusion that the Government has to accept the highest bid by formally confirming it or that it cannot grant the contract to any person other than one who had bid the highest. The Government has therefore discretion to confirm the bid or not to confirm it. Further rule 59 provides for the relaxation of any provision of the Rules in the interest of mineral development or better working of mines.

The view taken by the Government in the instant case in preferring a Co-operative Society of the labourers who work in the mines to the highest bidder cannot be said to be arbitrary or without any justification. The benefit arising out of the contract would go to the labourers and it will improve the economic position. In view of the spirit underlying rule 59 Government could therefore relax any such rule which could in any way come in the way of its granting the contract to the Co-operative Society.

Even if on the merits the highest bidder was entitled to have his bid confirmed as the collection of royalty was shortly to come to an end it would not be desirable to interfere with that contract by issuing a writ.

Appeal from the Judgment and Order, dated 5th August, 1965, of the Rajasthan High Court, Jodhpur, in D B Civil Writ Petition No 636 of 1964.

Satyoo Prasad, Senior Advocate (J B Dadachani, O C Mathur and Raminder Narain, Advocates of M/s J B Dadachani & Co, with him), for Appellant

M M Tawari, Senior Advocate (K K Jain and R N Sachdev, Advocates with him), for Respondent No 1

B B Taswaley, Senior Advocate (K P Gupta, Advocate with him), for Respondent No 2

The Judgment of the Court was delivered by

Raghubar Dayal, J.—This appeal, on certificate granted by the Rajasthan High Court, is against the dismissal of the appellant's writ petition under Article 226 of the Constitution praying for the issue of a writ of certiorari to the State of Rajasthan respondent No 1, for the cancelling and setting aside of its order dated 1st April 1964, granting the contract for collecting royalty on building stones excavated from certain area to respondent No 2, Dharti Dan Shramik Theka Sahkari Samiti, Ltd., a co-operative society. The appeal arises in these circumstances.

The appellant offered the highest bid at the auction for the grant of royalty collection contract on 21st January, 1964. Respondent No 2 was also one of the bidders, but stopped after offering a bid of Rs 33,000. The final bid of the appellant was for Rs 42,200. The State Government made the order in favour of respondent No 2 on an application made by it on 5th March, 1964, stating therein that the appellant had not deposited 25 per cent of the bid amount as security immediately after the completion of the auction in accordance with rule 36 (7) of the Rajasthan Minor Mineral Concession Rules, 1959 hereinafter called the Rules, and as per

\* C.A. No 79 of 1965

the terms and conditions of the Auction Notification and that it was prepared to take the royalty collection contract on the highest bid of Rs. 42,200. It was further stated in the application that respondent No. 2 was a co-operative society of the labourers who themselves, worked on the mines of the area and therefore in view of Government's policy it should receive preference to an individual bidder. It was further stated that the benefit accruing out of the contract of royalty collection would be shared by the labourers and workers themselves which would go a long way to improve their socio-economic conditions and thus ultimately would ameliorate the conditions of the workers who were working hard in quarries since long.

The contention for the appellant is that the Government had merely to confirm the highest bid at the auction by way of formality and was not competent to sanction the contract in favour of someone who had not offered the highest bid at the auction.

Rule 34 of the Rules provides that royalty collection contracts may be granted by the Government by auction or tender for a maximum period of two years after which no extension was to be granted. The procedure for auction is provided by rule 36. Sub-rule (5) thereof provides that no bids shall be regarded as accepted unless confirmed by Government or the competent authority and sub-rule (7) provides that on completion of the auction the result will be announced and the provisionally selected bidder shall immediately deposit 25 per cent. of the amount of bid for one year and another 25 per cent. as security for due observance of the terms and conditions of the lease or contract. It is admitted for the appellant that on completion of the auction he did not deposit 25 per cent. of the bid as a security in compliance with the provisions of sub-rule (7). He therefore lost whatever claim he could have had for the final acceptance of his bid by Government and therefore cannot question the grant of the contract to any other person by the Government.

The appellant urges that he held such royalty collection contract for the year 1963-64 and had deposited Rs. 9,250 as security for the due performance of that contract. On 12th February, 1964, over three weeks after the auction, he submitted an application to the Mining Engineer, Jaipur, stating that he had been continuously taking contract for the last three years and that he was depositing Rs. 1,300 and that the balance of the security amount required, i.e., Rs. 9,250 be adjusted against Rs. 9,250 with the Government in connection with the earlier contract. This letter was not replied to. The request made in this letter could not possibly be accepted. The earlier contract was to continue up to 31st March, and the security money had to remain with the Government upto that date. It is only after 31st March that anything could be said with some definiteness as to how much of the security money in deposit would be available to the contractor. Paragraph 2 of the Form of Agreement of Collection of Royalty on Minor Minerals, prescribed under the Rules, and set out in the Schedule to the Rules, states that the agreement shall remain in force for a period commencing from 1st April of a year and ending on 31st March of the next year on which the period of the contract would expire and that the security would be refunded on the termination of the contract. Para. 6 of the Form provides that for the due fulfilment of the terms and conditions of the contract the contractor shall deposit 25 per cent. of the contract money in advance as security which will be refunded on the termination of the contract. The appellant alleged that there was a practice of adjusting previous security amounts towards the security for the next contract. The practice is denied on behalf of respondent No. 1 and the practice against the provisions of the Rules cannot be recognized as of any binding effect. It may be mentioned here that the representation which the appellant made to the State Government on 6th April, 1964, made no reference to his depositing the security by depositing Rs. 1,300 and by making a request for the adjustment of the balance from the security amount already in deposit and indicates that he too did not consider the request for adjustment of the amount acceptable.

There is nothing in rule 36 of the Rules which may lead to the conclusion that the Government has to accept the highest bid by formally confirming it or that it



cannot grant the contract to any person other than one who had bid the highest. A bid is not regarded as accepted unless it is confirmed by Government. The Government has therefore discretion to confirm the bid or not to confirm it. Further rule 59 provides for the relaxation of any provisions of the Rules in the interest of mineral development or better working of mines.

There is the letter dated 14th February, 1962 from the Director of Mines and Geology, to all Mining Engineers on the subject of encouragement of co-operative mines and states that co-operative societies ought to be encouraged for mining work also as per directive of the Government of India. Respondent No. 2 addressed a letter to the Director of Mines and Geology and referred to Government policy for the encouragement of co-operative societies in connection with royalty collection contracts. The order of Government dated 1st April 1964 after referring to the appellant's offering the highest bid, stated that the Government was satisfied that the Society, respondent No. 2 was a suitable party for the grant of the said contract. The view taken by the Government in preferring respondent No. 2 to the appellant for the grant of the contract cannot be said to be arbitrary or without any justification. The co-operative society is of the labourers who work in the mines and it is obvious that any benefit arising out of the contract would go to the labourers and thus improve their economic position. In view of the spirit underlying rule 59 Government could therefore relax any such rule which could in any way come in the way of its granting the contract to respondent No. 2.

We therefore hold that the Government was competent to give the contract to respondent No. 2 it being not bound to accept the highest bid at the auction though usually it accepts such bids.

Another consideration which is decisively against the appellant is that the contract for the collection of royalty for the year 1964-65 is shortly to come to an end and it would not be desirable even if the appellant's contentions were acceptable, to interfere with that contract.

Reference, in this connection may be made to the decision of this Court in *K. N. Guruswamy v. State of Mysore*<sup>1</sup>, where the appellant was refused a writ solely on the ground that it would have been ineffective the period of the impugned contract coming to an end after about a fortnight of the order of this Court. That was a case where on merits the Court was of opinion that the writ should have been issued.

We therefore dismiss the appeal and order the parties to bear their own costs.

L.S.

*Appeal dismissed*

## THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction.)

PRESENT —RAGHUBAR DAYAL A ID J. R. MUDHOLKAR JJ

Karsandas H. Thacker

*Appellant\**

M/s The Saran Engineering Co. Ltd

*Respondent*

*Contract Act (IX of 1872) section 73—The contract (k)—Contract by X for sale of iron scraps to Y—Y entering into similar contract with third party for export—It each by X of original contract—Y unable to supply third party who purchased from open market and recovered the difference in price from Y—Y when entitled to recover the amount as damages from X.*

Y contracted to supply 7200 tons of scrap iron in July 1952. Y did not deliver the scrap iron and expressed his inability to comply with the contract by his letter dated January 1953. In the

<sup>1</sup> (1955) 1 S.C.R. 30, (1954) S.C.J. 644  
\* C.A. No. 772 of 1962.

mean time *T* had entered into a contract with M/s. Export Corporation for supplying them 200 tons of scrap iron. On account of the breach of contract by *X*, *T* could not comply with his contract with M/s. Export Corporation which in turn, purchased the necessary scrap iron from the open market and obtained from *T* the difference in the amount they had to pay and what they would have paid to *T* in pursuance of the contract. *T* then claimed this amount as damages from *X*.

**Held :** In view of the controlled price for scrap iron being the same on 30th January, 1953 as it was in July, 1952 *T* suffered no damages. There is nothing in the Iron and Steel (Scrap Control) Order (1943) or the Notification under the same, dated 30th June, 1951, fixing the controlled price of scrap iron among other things to exclude from its purview sale of scrap iron for purposes of export.

*T* is not entitled to calculate damages on the basis of what he had to pay his own vendees, unless, he had entered into the contract with *X* after informing *X* that he was purchasing the scrap for export; there was no controlled price applicable to purchases for export. *X*'s liability to damages for breach of contract on the basis of the market price for export would not depend on his belated knowledge that the scrap was intended for export but would depend on his knowledge of the fact at the time he entered into the contract. As *X* was not told at the time of the contract that *T* was making the purchase for delivery to the Export Corporation, *X* will not be liable for the damages which *T* had paid to the Export Corporation.

Appeal from the Judgment and Decree dated 19th April, 1961 of the Patna High Court in Appeal from Original Decree No. 377 of 1965.

*S. G. Patwardhan* and *N. C. Chatterjee*, Senior Advocates, (*A. K. Nag*, Advocate with them), for Appellant.

*A. V. Viswanatha Sastri*, Senior Advocate, (*J. B. Dadachanji*, *O. C. Mathur* and *Ravinder Narain*, Advocates of M/s. *J. B. Dadachanji & Co.*, with him), for Respondent.

The Judgment of the Court was delivered by

*Raghubar Dayal, J.*—Karsandas H. Thacker, appellant, sued the respondent for the recovery of Rs. 20,700 for damages for breach of contract. He alleged that he entered into a contract with the respondent for the supply of 200 tons of scrap iron in July, 1952 through correspondence, that the respondent did not deliver the scrap iron and expressed his inability to comply with the contract by its letter dated 30th January, 1953. In the meantime, the appellant had entered into a contract with M/s. Export Corporation, Calcutta, for supplying them 200 tons of scrap iron. On account of the breach of contract by the respondent the appellant could not comply with his contract with M/s. Export Corporation which, in its turn, purchased the necessary scrap iron from the open market and obtained from the appellant the difference in the amount they had to pay and what they would have paid to the appellant in pursuance of the contract.

The respondent contested the suit on grounds *inter alia* that there had been no completed contract between the parties and that the appellant suffered no damages. The controlled price of scrap iron on 30th January, 1953, was the same as it was in July, 1952 when the contract was made. It was further contended for the defendant that it was not liable to make good the damages the appellant had to pay to the Export Corporation as the appellant had entered into the contract on the basis of principal to principal and had not disclosed that he was purchasing scrap iron for the Export Corporation or for the purpose of export.

The trial Court accepted the plaintiff's case that there was a completed contract between the parties, that the respondent broke the contract and that the appellant was entitled to the damages claimed. It accordingly decreed the suit. On appeal by the respondent, the High Court reversed the decree. It held that there had been a completed contract between the parties on 25th October, 1952, but held that the respondent was not responsible for committing breach of contract as it could not perform the contract on account of the laches of the appellant and that the appellant suffered no damages in view of the controlled price for scrap iron being the same on 30th January, 1953 as it was in July, 1952. The result was that the appellant's suit was dismissed. The High Court granted the necessary certi-

ificate under Article 133 (1) (a) of the Constitution and that is how the appeal has been presented to this Court

It has been urged for the appellant that the Iron and Steel (Scrap Control) Order, 1943 hereinafter called the Scrap Control Order, and consequently, the controlled price of scrap iron applied to sales of scrap iron for use within the country and did not apply to sales of scrap iron for purposes of export. We do not find anything in the Defence of India Rules, 1939, under which the Scrap Control Order was issued in 1943 or in the Essential Supplies (Temporary Powers) Act 1946 that the Control Orders would not apply to sales of controlled articles for export. Rule 81 of the Defence of India Rules, 1939, authorised the Central Government *in et alia* to provide by order for maintaining supplies and services essential to the life of the community for the controlling of the prices at which articles or things of any description whatsoever may be sold and there is nothing to suggest that this control of prices was to apply only to sales of any articles within the country and not for purposes of export. Similarly, section 3 (1) of the Essential Supplies (Temporary Powers) Act 1946 provided that the Central Government may, by notified order provide for regulation or prohibition of production, supply and distribution of any essential commodity and for trade and commerce therein, in so far as it appears to be necessary and expedient for maintaining or increasing supplies of any essential commodity or securing its equitable distribution or availability at fair prices.

There is nothing in the terms of the Scrap Control Order or the Notification issued under clause 8 thereof by the Controller at the relevant period, viz., Notification S R O No 1007 dated 30th June, 1951, Part II, Section 3, fixing the controlled price of scrap iron among other things to exclude from its purview sale of scrap iron for purposes of export.

Reference is made for the appellant to what is stated in a letter from the Iron and Steel Controller, Government of India, to the appellant in March, 1954. Letter Exhibit 6 was in reply to a letter from the appellant and stated that there was no statutory price for scrap iron meant for export. This statement might be about the position in March, 1954. There is nothing in this letter to show that the statutory price of scrap iron meant for export was not covered by the Control Order in 1952.

Another letter from the Deputy Assistant Iron and Steel Controller to the appellant in August-September, 1954, Exhibit 1 (N), in reply to a telegram from the appellant said that the scrap Control Order was not applicable to scrap meant for export and added

\* Scraps which are permitted for export are generally collected from uncontrolled sources by the exporters.

Two things are to be noted. One is that it is not clear from this letter whether the Scrap Control Order was not applicable to scraps meant for export in 1952 and the other is that some sort of permission appeared to have been necessary for exporting scrap iron and that scrap iron for export was generally collected from uncontrolled sources, that is to say, ordinarily the Controller did not authorise purchase of scrap iron for export from controlled sources.

The Notification fixing the prices for the sale of scrap iron was applicable for the prices to be charged by persons other than controlled sources. It follows that purchases for exports from uncontrolled sources also offended against the provisions of clause 8 (4) of the Scrap Control Order if they charged prices higher than those fixed. Clause 8 empowered the Controller, with the approval of the Central Government, to publish by notification in the Official Gazette, prices for different classes of scrap. Sub-clause (4) thereof provided that no person could sell or offer for sale or dispose of and no person could acquire any scrap at prices in excess of those notified or fixed by the Controller under that clause.

We now deal with the quantum of damages. The appellant claimed damages at an amount equal to the difference between the price paid by his vendees and

the Export Corporation. and the price he would have paid to the respondent for 200 tons of scrap iron. He is not entitled to calculate damages on this basis, unless he had entered into the contract with the respondent after informing the latter that he was purchasing the scrap for export, if there was no controlled price applicable to purchases for export. There is nothing on the record to establish that the defendant was told. before the contract was entered into, that the appellant was purchasing the scrap iron for export. There is nothing about it in the correspondence which concluded the contract. The first indirect indication of the scrap being required for export could be had by the respondent late in October 1952 when it was informed that the scrap iron was to be despatched to the Export Corporation. The respondent could have possibly inferred then that the scrap iron it was to sell to the appellant was meant for export. Such information to it was belated. Its liability to damages for breach of contract on the basis of the market price of scrap iron for export would not depend on its belated knowledge but would depend on its knowledge of the fact at the time it entered into the contract.

The appellant stated in para. 7 of the plaint that the plaintiff, to the knowledge of the defendant company, sold the said 200 tons of iron scrap purchased from the defendant to M/s. Export Corporation who required the same for shipping purposes. This statement does not refer to the time when the defendant had the knowledge that the scrap iron was required for shipping purposes. From the contents of the correspondence, such knowledge, as already mentioned, could be possibly had by the defendant after 25th October, 1952. Further, this statement in the plaint refers to the knowledge of the sale to the Export Corporation and does not directly refer to his knowledge about the scrap iron being required for export. The respondent, in its written statement, denied the statements in para. 7 of the plaint.

In his deposition, the appellant stated that the defendant company knew that he had sold the goods to the Export Corporation and the Export Corporation wanted the goods for shipping, but in cross-examination, had to state that he himself had no concern or interest in the business of the Export Corporation, that he purchased the scrap iron from the defendant company on his own accord and that he had sold 200 tons of scrap iron to the Export Corporation on 25th October, 1952. It is clear therefore that the respondent company could not have possibly known in July, 1952 when the contract was made that the appellant was purchasing scrap iron for export through the Export Corporation. The appellant himself stated in cross-examination that he talked of selling to the Export Corporation after the close of the negotiation with defendant on 25th July, 1952.

The only other material on which the appellant relies in support of his contention is that he had purchased to the knowledge of the respondent company scrap iron for export, is the use of the expression 'very fancy price' in the first letter he had written to the respondent on 9th June, 1952. The letter said :

"We take pleasure to inform you that we are at present purchasing the scrap iron of the following descriptions at a very fancy price."

and required the respondent to communicate the exact quantity of each of the items mentioned in that letter, available for sale, together with their lowest price. It is urged that when prices were controlled, a suggestion to purchase at a very fancy price was a clear indication of the appellant's purchasing the various items for purposes of export. The offer to purchase at a very fancy price appears to be very remote and slender basis for coming to the conclusion that the respondent company must have known that the appellant wanted to purchase the items for export. The effect of the Controller's fixing the prices is only this that nobody can lawfully charge a price higher than the fixed price. The seller is however at liberty to sell the article at any price lower than the price fixed. It is therefore that the appellant had asked the respondent to quote their lowest prices. Readiness to pay a very fancy price could therefore mean a good price within the price limit fixed by the Controller.

We are therefore of opinion that the High Court was right in coming to the conclusion that the defendant-respondent did not know that the appellant was pur-

chasing scrap iron for export. The appellant, on the breach of contract by the respondent, was entitled, under section 73 of the Contract Act, to receive compensation for any loss by the damage caused to him which naturally arose in the usual course of business from such breach or which the parties knew when they made the contract to be likely to result from the breach of it. Under section 73 of the Contract Act, such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach. Now, the loss which could have naturally arisen in the usual course of things from the breach of contract by the respondent in the present case would be nil. The appellant agreed to purchase scrap iron from the respondent at Rs 100 per ton. It may be presumed he was paying Rs 70, the controlled price, and Rs 30 the balance, for the other incidental charges. On account of the non-delivery of scrap iron he could have purchased the scrap iron from the market at the same controlled price and similar incidental charges. This means that he did not stand to pay a higher price than what he was to pay to the respondent and therefore he could not have suffered any loss on account of the breach of contract by the respondent. The actual loss which according to the appellant he suffered on account of the breach of contract by the respondent was the result of his contracting to sell 200 tons of scrap iron for export to the Export Corporation. It may be assumed that, as stated, the market price of scrap iron for export on 30th January, 1953 was the price paid by the Export Corporation for the purchase of scrap iron that day. As the parties did not know and could not have known when the contract was made in July, 1952 that the scrap iron would be ultimately sold by the appellant to the Export Corporation the parties could not have known of the likelihood of the loss actually suffered by the appellant, according to him, on account of the failure of the respondent to fulfil the contract.

*Illustration (k)* to section 73 of the Contract Act is apt for the purpose of this case. According to that *Illustration* the person committing breach of contract has to pay to the other party the difference between the contract price of the articles agreed to be sold and the sum paid by the other party for purchasing another article on account of the default of the first party but the first party has not to pay the compensation which the second party had to pay to third parties as he had not been told at the time of the contract that the second party was making the purchase of the article for delivery to such third parties.

We therefore hold that the High Court was right in holding that the appellant suffered no such damage which he could recover from the respondent.

In view of what we have said above, it is not necessary to discuss whether the correspondence between the parties in June-July, 1952 made out a completed contract or not and whether the appellant committed breach of contract or not.

The result is that the appeal fails and is dismissed with costs.

K S

*Appeal dismissed*

## THE SUPREME COURT OF INDIA

(Criminal Appellate Jurisdiction)

PRESENT —K. V. WANCHOO, J. R. MUDHOLKAR AND S. M. SIKRI, JJ

The State of Uttar Pradesh

*Appellant\**

Ramagya Sharma Vaidya

*Respondent*

*Iron and Steel (Control) Order (1956) clause 7—Construction—"Use"—If includes "non-use"—Conditions of permit—Application for permit if can be looked into to find out.*

*Word and phrase—"Use"—If includes non-use*

Mere "non-use" is not included in the word "use" (in the term shall not use the iron or steel otherwise than in accordance with any condition contained in order of Controller) in clause 7 of the Iron and Steel (Control) Order (1956). If it had been the intention to include keeping or storing within the word "use" there would have been some provision regarding the period during which it

would be permissible to keep or store the iron, for it is common knowledge that building operations take some considerable time and are sometimes held up for shortage of material or other reasons. Further the word "use" must take its colour from the context in which it is used. In clause 7 the expression "use.....in accordance with the conditions contained" suggests something done positively, e.g., utilisation or disposal. Mere "non-use" is not included in "use".

It is permissible to refer to the application and the Order to find out the purpose for which the iron was obtained.

Appeal by Special Leave from the Judgment and Order dated 24th August, 1962 of the Allahabad High Court in Government Appeal No. 1379 of 1962.

*B. C. Misra and O. P. Rana, for Appellant.*

*J. P. Goyal Advocate, for Respondent.*

The judgment of the Court was delivered by

*Sikri, J.*—This appeal by Special Leave is directed against the judgment of the Allahabad High Court dismissing the appeal of the State against the judgment of the Sessions Judge allowing the appeal of the respondent and acquitting him.

The respondent obtained permits under the Iron and Steel (Control) Order, 1956—hereinafter referred to as the Control Order—for about 28 tons of iron, including 6 tons of rods, 15 tons of joints and 2 tons of G.C. sheets. He is alleged to have purchased these articles on the basis of the above permits between July, 1957 and March, 1958. The permits were obtained on three applications made by the respondent. Only two applications are in the printed record. The first application is dated 23rd May, 1957, and is addressed to the Provincial Iron and Steel Controller, Kanpur, through the District Magistrate, Deoria. In this application the respondent stated that he was a political sufferer and he was constructing a public temple for which he required five tons of M.S. Round and eight tons of Girder. He further stated that the requirements were not available at Deoria and as such the application should be considered and forwarded to the Controller for consideration and orders. It appears that this application was forwarded, duly recommended, by the District Supply Officer, Deoria, and ultimately a permit was given to him by the Controller. He made another application dated 7th September, 1957. In this application he again stated that he was a political sufferer and he was constructing a public temple and *dharamshala* for which he required certain quantities of iron. He further stated that the requirements were not available at Deoria and as such the application should be forwarded to the Controller. This application was also recommended and forwarded and ultimately a permit was given to him. On 3rd January, 1958, the accused made another application (Exhibit Ka. 9—not available in the printed record) and a permit was given to him by the District Supply Officer himself. We may mention that the original permits are not printed in the record, and, therefore, we have not been able to see for ourselves as to what are the exact conditions contained in the permits.

It is the case of the prosecution that the respondent after obtaining the materials sanctioned to him under the permits did not construct any temple or *dharamshala* building at Barhaj Bazar or at any other place. We may mention that Barhaj Bazaar is the place where he lives and the applications which are in the record also mention this address.

Before the Magistrate who tried the case the respondent was put the following question :

"It is alleged that the iron obtained under the permits mentioned in questions 2, 3 and 4 was not utilised for the purpose for which it was taken. What have you to say in this respect?"

The respondent's reply was :

"No. Whatever iron I got, I used it in the temple situate in mauza Tinhari, P. S. Madhuban, district Azamgarh, which is my place of residence as well."

Before the Magistrate the accused had admitted to have purchased about 17 tons of iron. The Magistrate held it proved that the accused had at least purchased

one ton more from on Mishri Lal P W 7. Thus, he came to the conclusion that the accused had purchased at least 18 tons of iron. He further held that on the evidence it was clear that only  $\frac{3}{4}$  tons of rods had been utilised in the building constructed at Tinhari, but as the building had been constructed between 1913-52, no portion of the iron obtained by the accused had been utilised for the purpose for which it was procured. He further held that the accused had disposed of the iron wrongfully at Kanpur and did not even bring the same to Barhaj Bazar or Tinhari. Accordingly he held that the respondent had contravened the provisions of clause 7 of the Control Order.

The respondent filed an appeal before the Sessions Judge. The Sessions Judge held that barring a very small quantity of iron, the remaining quantity that was received by the respondent had not been utilised in the temple or *dhamshala* at Tinhari. Differing from the Magistrate, he held that it was not proved by any evidence that the respondent had actually sold the excess quantity at Kanpur. He then observed that

'in the absence of any such evidence the possibility of the appellant retaining the iron at some other place is not completely excluded.

Then construing clause 7 of the Control Order, he observed that,

'in the aforesaid section there is no mention that the iron purchased should be utilised at any particular place or within a particular period. The condition in the various permits granted to the appellant was simply that he should utilise the iron in erecting a temple or *dhamshala* in the town of Barhaj. It may be noted that the main purpose was the construction of a temple and *dhamshala* the place where it was to be constructed does not appear to have much significance. Further no time-limit is given during which the entire quantity of iron should be utilised.'

Accordingly he held that there had been no contravention of clause 7 of the Control Order.

The State appealed to the High Court. Srivastava, J., dismissed the appeal holding that there had been no contravention of clause 7 of the Control Order. According to him, two essentials are necessary before there can be contravention of clause 7.

'In the first place the iron and steel should be 'used', secondly it should be used otherwise than in accordance with the conditions contained or incorporated in the document which was the authority for the acquisition.'

He held that the first condition had not been fulfilled because it had not been proved that the respondent had used the iron which he had obtained on the basis of the permit. It appears that the findings of the learned Sessions Judge, as well as the Magistrate, that he had not used or utilised the remaining portions of the iron and steel at all were not questioned before him. According to him, if the remaining quantity of iron was still unutilised or unused, then the respondent could not be said to have done anything contrary to clause 7. He further held that the second condition had also not been fulfilled because the permit itself contained only one condition printed on its back. This condition was "that the materials required against the permit will be used only for the purpose for which it was asked for and has been given." According to him, it is not permissible to refer to the application made for the permit because the only document that can be looked at is the permit. He was, however, prepared to concede that

"it is also open to the officer to mention in the permit that it is being granted for the purpose mentioned in the application. That may be a shortcut for avoiding the trouble of entering in the permit the details of the purpose. In that case it may be permissible to refer to the application."

In spite of this concession, he concluded that,

'when even that is not done, in fact no condition is mentioned in the permit at all about the manner in which the iron or steel is to be utilised. It cannot be said that a condition of the permit has been broken because the assurance given in the application has not been carried out.'

Mr B. C. Misra, learned Counsel for the appellant, has urged before us that on the facts found by the learned Session Judge, clause 7 of the Control Order has been contravened. He says that the word 'use' in clause 7 includes "kept for eventual use for another purpose." He says that if one stores iron and steel, one uses it and

the word "use" does not imply consumption only. Relying on Maxwell on Interpretation of Statutes, Eleventh Edition, page 266, he says that we should give a wide construction to the word "use" in clause 7.

Clause 5 and the relevant portion of clause 7 of the Control Order are as follows:

"5. *Disposals*.—No person, who acquires iron or steel under clause 4, or no producer shall dispose of or agree to dispose of or export or agree to export from any place to which this Order extends any iron or steel, except in accordance with the conditions contained or incorporated in a special or general written order of the Controller.

7. *Use of Iron and Steel to conform to conditions governing acquisition*.—A person acquiring iron or steel in accordance with the provisions of clause 4 shall not use the iron or steel otherwise than in accordance with any conditions contained or incorporated in the document which was the authority for the acquisition .....

We are unable to accede to the above contentions. There is no provision in the Control Order requiring that iron or steel acquired under the Control Order should be utilised within a specified time. If it had been the intention to include keeping or storing within the word 'use' there would have been some provision regarding the period during which it would be permissible to keep or store the iron, for it is common knowledge that building operations take some considerable time and are sometimes held up for shortage of material or other reasons. Further the word 'use' must take its colour from the context in which it is used. In clause 7 the expression "use...in accordance with the conditions contained" suggests something done positively, e.g. utilisation or disposal. Mere 'non-use', in our opinion, is not included in the word 'use'. The passage relied on by the learned Counsel in Maxwell is as follows:

"*Wide Sense given to words*.—The rule of construction, however, whenever invoked comes attended with qualifications and other rules no less important, and it is by the light which each contributes that the meaning must be determined. Among them is the rule that the sense of the words is to be adopted which best harmonises with the context and promotes in the fullest manner the policy and object of the legislature. The paramount object, in construing penal as well as other statutes, is to ascertain the legislative intent, and the rule of strict construction is not violated by permitting the words to have their full meaning, or the more extensive of two meanings, when best effectuating the intention. They are, indeed, frequently taken in the widest sense, sometimes even in a sense more wide than etymologically belongs or is popularly attached to them, in order to carry out effectually the legislative intent, or, to use Sir Edward Coke's words to suppress the mischief and advance the remedy."

But this passage does not warrant the giving of a meaning to a word apart from the context in which it is used. There is no doubt that the Legislative intent of the Control Order is that this essential commodity should be utilised in accordance with the conditions contained in the permit, but no clause in this Control Order evinces a legislative intent that a mere non-user is also prohibited and made punishable.

The learned Counsel referred to *London County Council v. Wood*<sup>1</sup>, but we do not derive any assistance from that case. The Head-note brings out the point decided in that case as follows:

"The Highways and Locomotives Act, 1878, provides by section 32 that 'A county authority may ..... make ..... by-laws for granting annual licences to locomotives used within their county.' And by a by-law made by the London County Council under that section it was provided that 'no locomotive shall be used on any Highway within the County of London until an annual licence for the use of the same shall have been obtained from the council by the owner thereof:—

*Held*, that a steam-roller which was not at the time being employed in road-making, but was merely passing through the county to a destination outside was being "used within the county" within the meaning of the section and the by-law."

In the context, the word "used" was, with respect properly construed. Collins, J., held that,

"the object of the Act was evidently to protect the highways, and the effect of a steam-roller upon the highways may be just the same whether it be engaged in mending the roads or not."

In conclusion we hold that it has not been established that the respondent had used the iron acquired by him in contravention of clause 7 of the Control Order.



The learned Counsel further urges that the High Court erred in holding that the application cannot be referred to for the purpose of construing the conditions appearing in the permit, the condition being that 'the materials acquired against a permit will be used only for the purpose for which it was asked for and has been given'. He says that the expression 'the purpose for which it was asked for' refers back to the application, and the expression 'has given' refers back to the Order. There is some force in what he urges. We are unable to sustain the finding of the High Court that it is not permissible to refer to the application and the order to find out the purpose for which the iron was obtained. But even if we look at the applications, which are in the printed record, the purpose mentioned is only construction of a temple, in the application dated 23rd May, 1957 and temple and *dharamshala* in the application dated 7th September 1957. These applications do not disclose that the respondent wanted to construct the temple and *dharamshala* at any particular place. It is urged that the sentence which occurs in both the applications, namely, that the requirements are not available at Deoria, shows that the purpose for which the iron and steel was required was for construction of a temple and *dharamshala* in the district of Deoria. This argument is sought to be reinforced by asserting that a District Magistrate was not empowered to recommend applications for iron required for works to be constructed outside the District, and therefore it must be held that the purpose was construction of a temple and *dharamshala* in the district of Deoria. However, no orders showing the jurisdiction of the District Magistrate in respect of this matter has been shown to us, and we are unable to conclude from the applications that the purpose was construction of a temple and *dharamshala* in the district of Deoria alone.

Accordingly we hold that the respondent has not contravened clause 7 of the Control Order. The appeal accordingly fails and is dismissed.

K.S.

*Appeal dismissed*

## THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT —K. SUBBA RAO, J C SHAH AND R. S. BACHAWAT, JJ

The Cochin State Power and Light Corporation, Ltd

*Appellant\**

*v*  
The State of Kerala

*Respondent*

*Electricity Act (IV of 1910) (as amended by Act XXII of 1959), section 6—Scope—Electricity Board for the state exercising option to purchase the undertaking but notice to licensee not being in accordance with law—Effect—State Government if vested with the option under section 6 (2) of the amended Act*

Assuming without deciding that the option of purchasing the undertaking on the expiry of the period of 25 years specified in the licence was available under section 6 (1) of the Electricity Act (1910) (as amended in 1959) such option vested in the State Electricity Board and in the instant case as the Board duly elected to purchase the undertaking the State Government acquiring no right or option of purchasing the undertaking under section 6 (1) cannot be said that as the Board had not given notice to the State Government as required by section 6 (4) it must be deemed to have elected not to purchase the undertaking. Section 6 came into force on 5th September, 1959, and in the instant case the relevant period expired on 3rd December, 1960. In the circumstances the giving of the requisite notice of 18 months in respect of the option of purchase on the expiry of 2nd December 1960 was impossible from the commencement of section 6. The performance of this impossible duty must be executed in accordance with the maxim, *lex non cogit ad impossibilia* (the law does not compel the doing of impossibilities) and sub-section (4) of section 6 must be construed as not being applicable to a case where compliance with it is impossible.

By notice served upon the licensee the Board duly elected to purchase the undertaking on the expiry of 25 years. Consequently, the State Government never became vested with the option of purchasing the undertaking under section 6 (2). The State Government must, therefore, be restrained from taking action under its notice of 20th November, 1959.

Appeal from the Judgment and Order, dated 4th October, 1962 of the Kerala High Court, Ernakulam, in Writ Appeal No. 17 of 1962.

*A. V. Viswanatha Sastri*, Senior Advocate (*Arun B. Saharaya* and *Sardar Bahadur*, Advocates, with him), for Appellant.

*V. P. Gopalan Nambiar*, Advocate-General for the State of Kerala (*V. A. Seyid Muhammad*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

*Bachawat, J.*—The short question in this appeal is whether the proposed acquisition of the electrical supply undertaking of the appellant by the State of Kerala in pursuance of the notice, Exhibit G, dated 20th November, 1959 is authorised by section 6 of the Indian Electricity Act, 1910.

The appellant is the holder of a licence for the supply of electrical energy in Ernakulam and other places in Cochin. The licence was originally granted to the managing agents of the appellant under the Cochin Electricity Regulation III of 1102 then in force in Cochin and subsequently assigned to the appellant with the permission of the Cochin Government. On the merger of Travancore-Cochin with the Union of India, the Indian Electricity Act, 1910 was made applicable by the Part B States Laws Act, 1951 (III of 1951) to the Travancore-Cochin area, and the Cochin Electricity Regulation stood repealed. The Electricity (Supply) Act, 1948 (LIV of 1948) was also made applicable to the Travancore-Cochin area by the Part B States Laws Act, 1951. On 31st March, 1957 the Kerala Electricity Board was constituted, and by section 71 of Act LIV of 1948, any right and option to purchase the undertaking of the licensee under the Indian Electricity Act, 1910 was transferred to and vested in the Board. Now, the right or option to purchase the undertaking of a licensee under section 7 (1) of the Indian Electricity Act, 1910 then in force was exercisable "on the expiration of such period not exceeding fifty years, and of every such subsequent period, not exceeding twenty years as shall be specified in this behalf in the licence". Sub-section (4) of section 7 provided :

"Not less than two years' notice in writing of any election to purchase under this section shall be served upon the licensee by the local authority or the State Government, as the case may be."

Clause 15 (a) of the licence held by the appellant provides :

"The option of purchase given by section 7, sub-section (1) of the Regulation shall first be exercisable on the expiration of 25 years from the commencement of this licence and on the expiration of every subsequent period of ten years during the continuance of this licence."

Section 7 (1) of the Indian Electricity Act, 1910 corresponds to section 7 (i) of the Regulation, that is to say, of the Cochin Electricity Regulation. The date of the commencement of the licence is 3rd December, 1935. The period of 25 years mentioned in clause 15 (a) of the licence expired on 2nd December, 1960. The last date for giving the two years' notice of the election to purchase on the expiry of 2nd December, 1960 required under section 7 (4) of the Indian Electricity Act, 1910 expired on 2nd December, 1958. On 11th February, 1959, the State Electricity Board served on the appellant a notice, Exhibit B, of its election to purchase the undertaking of the appellant on the expiry of 2nd December, 1960, but this notice not being in accordance with section 7 (4) was of no legal effect.

By the Indian Electricity (Amendment) Act, 1959 (XXXII of 1959), section 6 now in force was substituted for the old section 7 of the Indian Electricity Act, 1910, with effect from 5th September, 1959. Section 6 of the Indian Electricity Act, 1910 now in force reads :

"6. (1) Where a licence has been granted to any person not being a local authority, the State Electricity Board shall,—

(a) in the case of a licence granted before the commencement of the Indian Electricity (Amendment) Act, 1959, on the expiration of each such period as is specified in the licence ; and

(b) in the case of a licence granted on or after commencement of the said Act, on the expiration of such period not exceeding twenty years and of every such subsequent period, not exceeding ten years, as shall be specified in this behalf in the licence ;

have the option of purchasing the undertaking and such option shall be exercised by the State Electricity Board serving upon the licensee a notice in writing of not less than one year requiring the licensee to sell the undertaking to it at the expiry of the relevant period referred to in this sub-section.

(2) Where a State Electricity Board has not been constituted or if constituted does not elect to purchase the undertaking the State Government shall have the like option to be exercised in the like manner of purchasing the undertaking.

(3) Where neither the State Electricity Board nor the State Government elects to purchase the undertaking any local authority constituted for an area within which the whole of the area of supply is included shall have the like option to be exercised in the like manner of purchasing the undertaking.

(4) If the State Electricity Board intends to exercise 'the option of purchasing the undertaking' under this section it shall send an intimation in writing of such intention to the State Government at least eighteen months before the expiry of the relevant period referred to in sub-section (1) and if no such intimation as aforesaid is received by the State Government the State Electricity Board shall be deemed to have elected not to purchase the undertaking.

(5) If the State Government intends to exercise the option of purchasing the undertaking under this section it shall send an intimation in writing of such intention to the local authority if any referred to in sub-section (3) at least fifteen months before the expiry of the relevant period referred to in sub-section (1) and if no such intimation as aforesaid is received by the local authority the State Government shall be deemed to have elected not to purchase the undertaking.

(6) Where a notice exercising the option of purchasing the undertaking has been served upon the licensee under this section the licensee shall deliver the undertaking to the State Electricity Board, the State Government or the local authority as the case may be on the expiration of the relevant period referred to in sub-section (1) pending the determination and payment of the purchase price.

(7) Where an undertaking is purchased under this section the purchaser shall pay to the licensee the purchase price determined in accordance with the provisions of sub-section (4) of section 7-A."

On 24th October 1959 the State Electricity Board served upon the appellant a notice, Exhibit D, of its election to purchase the undertaking on the expiry of 2nd December, 1960. On 29th October, 1959 the State Electricity Board served upon the appellant another notice, Exhibit I, of its election. On 20th November, 1959, the State Government served upon the appellant a notice, Exhibit G, of its election to purchase the undertaking on the expiry of 2nd December, 1960. On 14th November, 1960, the appellant filed a writ petition in the High Court of Kerala impleading the State of Kerala and the Kerala State Electricity Board and asking for the issue of appropriate writs and orders restraining them from taking any action pursuant to the notices Exhibits B, D, E, and G. On 20th December, 1961, a learned single Judge of the High Court passed the following order:

"In view of the representation made before me by both the learned Advocate-General appearing for the State the 1st respondent and Mr. Krishnaswami Iyengar, learned Counsel appearing for the Kerala State Electricity Board the second respondent that for the purpose of this writ petition the notices issued by the Kerala State Electricity Board Exhibits B, D and E can be ignored it follows that neither the 1st respondent nor the 2nd respondent has any jurisdiction or power to take any action on the basis of Exhibits B, D or E. In view of the fact that I am upholding the action of the State Government, who had issued the notice Exhibit G it follows that the 1st respondent alone is entitled to take further action under the Act in pursuance of the notice Exhibit G issued and sent along with the covering letter Exhibit F, on 20th November 1959. It follows subject to what is stated about Exhibits B, D and E, that the writ petition has to be dismissed. There will be no order as to costs."

The effect of this order was that the State Electricity Board waived and abandoned all its rights of pursuance of the undertaking under the notices, Exhibits B, D and I, and neither the Kerala State Electricity Board nor the State of Kerala had any jurisdiction or power to take any action on the basis of those notices, and save as aforesaid, the writ petition was dismissed, and it was held that the State Government was entitled to take further action under its notice, Exhibit G. Aggrieved by this order, the appellant filed an appeal in the Kerala High Court impleading the State Government only as the party respondent. The State Electricity Board did not file any appeal from the order of the learned single Judge. By its judgment dated 31st October, 1962, a Division Bench of the High Court dismissed the appeal. In paragraph 15 of its judgment, the Bench observed:

"In its petition the appellant asked for reliefs both against the State Government and the State Electricity Board. However in the course of the hearing of the petition, the Board gave up its claims under Exhibits B, D and E and only the claim of the State Government under Exhibit G was canvassed. The petition was, in effect allowed again at the Bar and the Board has not appealed and is not a party to the present appeal and its notices may therefore be ignored except to the extent that they may affect the rights of the State Government."

The appellant now appeals to this Court under a certificate granted by the High Court under Articles 133 (1) (a) and 133 (1) (c) of the Constitution.

On behalf of the appellant, Mr. Viswanatha Sastry contended that (1) as the two years' notice in writing of the election to purchase the undertaking on the expiry of 2nd December, 1960 was not served on the appellant as required by the old section 7 (4) of the Indian Electricity Act, 1910, the appellant acquired a vested right to hold the licence until the expiry of a further period of ten years, that is to say, until 2nd December, 1970, and this vested right was not taken away either expressly or by necessary implication by the new section 6 of the Indian Electricity Act, 1910 introduced by the amending Act XXXII of 1958; (2) the expression, "on the expiration of each such period as is specified in the licence" in the new section 6 (1) (a) means a period which has not expired and on the expiry of which the option may be legally exercised, and since in the absence of the two years' notice required under the old section 7 (4), the option of purchase on the expiry of 2nd December, 1960 could not be legally exercised, the new section 6 (1) did not confer any option of purchase on the expiry of 2nd December, 1960 and the first option exercised under the new section 6 (1) would be on the expiry of 2nd December, 1970; (3) sub-sections (4) and (5) of the new section 6 show that the period on the expiry of which the option under sub-section (1) of section 6 is exercisable, is a period which would expire at least 18 months after the coming into force of the new section 6 that is to say, after 5th September, 1959, and since the period expiring on 2nd December, 1960 is not such a period, the new section 6 (1) did not confer any option of purchase on the expiry of 2nd December, 1960; and (4) in any event, the State Electricity Board having duly elected to purchase the undertaking on the expiry of 2nd December, 1960, the State Government acquired no option of purchase under sub-section (2) of section 6 of the Indian Electricity Act, 1910.

On behalf of the respondent Mr. V. P. Gopalan Nambiar, the Advocate-General of Kerala, contended (1) that the absence of two years' notice under the old section 7 (4) of the Indian Electricity Act, 1910 did not confer upon the appellant a vested right to hold the licence until the expiry of 2nd December, 1970, and the immunity from compulsory purchase under the old section 7 arising from the non-service of the requisite two years' notice could be, and, in fact, was taken away by the new section 6, which required only one year's notice of intention to purchase the undertaking; (2) assuming that the appellant acquired under the old section 7 a vested right to hold the licence until 2nd December, 1970, such vested right was taken away by the new section 6, which expressly applies to licences granted before its commencement, and the period of 25 years is a period specified in the licence on the expiry of which the option of purchase was legally exercisable; (3) sub-sections (4) and (5) of the new section 6 did not cut down the plain meaning of sub-section (1) of the section and the option on the expiry of the period of 25 years was vested under sub-section (1) of section 6, though this period did not expire 18 months after 5th September, 1959; and (4) as the State Electricity Board did not send to the State Government any intimation in writing of its intention to exercise the option on the expiry of 2nd December, 1960 as required by sub-section (4) of section 6 the Board must be deemed to have elected not to exercise this option, and consequently by sub-section (2) of section 6, the State Government is vested with the option.

We think that the fourth contention of Mr. Viswanatha Sastry is sound, and should be accepted. Assuming, without deciding, that the option of purchasing the undertaking on the expiry of the period of 25 years specified in the licence was available under sub-section (1) of section 6, such option vested in the State Electricity Board, and as the Board duly elected to purchase the undertaking, the State Government acquired no right or option of purchasing the undertaking under section 6. On this ground alone, the appeal should be allowed, and in this view of the matter, we do not think it necessary to express any opinion on the other contentions urged before us. As far as the State Electricity Board is concerned, it has abandoned and waived its option of purchase on the expiry of 25 years.

Sub-section (1) of section 6 expressly vests in the State Electricity Board the option of purchase on the expiry of the relevant period specified in the licence. But the State Government claims that under sub-section (2) of section 6 it is now vested with the option. Now, under sub-section (2) of section 6, the State Government would be vested with the option only "where a State Electricity Board has not been constituted, or if constituted, does not elect to purchase the undertaking". It is common case that the State Electricity Board was duly constituted. But the State Government claims that the State Electricity Board did not elect to purchase the undertaking. For this purpose, the State Government relies upon the deeming provisions of sub-section (4) of section 6, and contends that as the Board did not send to the State Government any intimation in writing of its intention to exercise the option as required by the sub-section the Board must be deemed to have elected not to purchase the undertaking. Now, the effect of sub-section (4) read with sub-section (2) of section 6 is that on failure of the Board to give the notice prescribed by sub-section (4), the option vested in the Board under sub-section (1) of section 6 was liable to be divested. Sub-section (4) of section 6 imposed upon the Board the duty of giving after the coming into force of section 6 a notice in writing of its intention to exercise the option at least 18 months before the expiry of the relevant period. Section 6 came into force on 5th September, 1959, and the relevant period expired on 3rd December, 1960. In the circumstances, the giving of the requisite notice of 18 months in respect of the option of purchase on the expiry of 2nd December, 1960 was impossible from the very commencement of section 6. The performance of this impossible duty must be excused in accordance with the maxim, *lex non cogit ad impossibilia* (the law does not compel the doing of impossibilities), and sub-section (4) of section 6 must be construed as not being applicable to a case where compliance with it is impossible. We must therefore, hold that the State Electricity Board was not required to give the notice under sub-section (4) of section 6 in respect of its option of purchase on the expiry of 25 years. It must follow that the Board cannot be deemed to have elected not to purchase the undertaking under sub-section (4) of section 6. By the notice served upon the appellant, the Board duly elected to purchase the undertaking on the expiry of 25 years. Consequently, the State Government never became vested with the option of purchasing the undertaking under sub-section (2) of section 6. The State Government must, therefore, be restrained from taking action under its notice, Exhibit G, dated 20th November, 1959.

In the result, the appeal is allowed, and the respondent State of Kerala is restrained from taking any action under the notice, Exhibit G, dated 20th November, 1959. The respondent shall pay to the appellant the costs in this Court. We direct the parties to pay and bear their own costs in the Courts below.

K.S.

*Appeal allowed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUTBA RAO, J. C. SHAH AND R. S. BACHAWAT, JJ.

Nawabzada Syed Zainuddin Hossain Mirza *alias* Luddan Sahab  
and others

.. *Appellants\**

v.

Satyendra Nath Bose and others

.. *Respondents.*

*Bihar Land Reforms Act (XXX of 1950), section 14—Claim by mortgagee—Limitation—Considerations*

Section 14 of the Bihar Land Reforms Act fixes the period of limitation of six months from the date prescribed thereunder for making such a claim. It is no doubt implicit in the provisions that the claim to recover the amount under the mortgage should be *voluntary*, that is to say, it should not have become barred. But whether the claim on the mortgage is barred or not may also depend upon another question whether a decree has been obtained on the said mortgage or not. If no suit has been filed the Claims Officer will have to ascertain whether on the date the claim is made a suit to

enforce that mortgage is barred. If a decree has been obtained, the Claims Officer will have to ascertain whether on the date the claim is made the decree has become barred. If the Claims Officer is satisfied that it is in time either because the mortgage claim is within the prescribed time or because the decree is not barred by limitation, he proceeds to ascertain the amount due under the mortgage in the manner prescribed by the Act and the Rules made thereunder and, if a decree is made even by reopening it.

In the instant case where the mortgagee in his claim petition expressly stated that a decree was obtained on the mortgage the High Court was quite justified in holding that the claim was also in substance based on the foreign decree which would be within time under Article 117 of the Limitation Act.

Appeal by Special Leave from the Judgment and Order dated 24th August, 1961 of the Board, constituted under section 18 of the Bihar Land Reforms Act, 1950, in Claim Appeal No. 61 of 1956.

*A. V. Viswanatha Sastri*, Senior Advocate (*J. C. Sinha* and *K. K. Sinha*, Advocates, with him), for Appellants.

*B. Sen*, Senior Advocate, (*S. N. Mukherjee*, Advocate, with him), for Respondents.

The Judgment of the Court was delivered by

*Subba Rao, J.*—One Kumar Pramatha Nath Roy advanced 5 loans to the predecessors-in-interest of the appellants and the opposite parties 1 to 5 before the Claims Officer on the mortgages of Khagra Estate which was jointly owned by them. Out of the said mortgages, the appellants' predecessors-in-interest executed 3 mortgages, Exhibits 1-B, 1-C and 1-D, dated 30th September, 1927, 30th June, 1932, and 23rd June, 1935, respectively. The said Kumar Pramatha Nath Roy filed Title Mortgage Suit No. 3/13 of 1937 in the Court of the Subordinate Judge, Dinajpur, to enforce the mortgages and obtained a decree therein. The mortgagee and some of the mortgagors filed appeals in the Dacca High Court against the said decree. On 18th August, 1949, by a common judgment a mortgage decree was made by the High Court in favour of the mortgagee whereunder the appellants were made liable to pay a sum of Rs. 10,27,594-9-6. Subsequently the said Estate was notified under section 3 of the Bihar Land Reforms Act, 1950, hereinafter called the Act. Thereafter, on 27th October, 1952, the mortgagee filed a petition under section 14 (1) of the Act in the Court of the Subordinate Judge, Claims Officer, Bhagalpur Division, Purnea Camp, setting up his claim to the amount due to him from the appellants in terms of section 16 of the Act. To that petition he made the legal representatives of the original mortgagors of all the five mortgages as parties. Opposite parties 6 to 12 are the appellants, who represent the mortgagors under Exhibits 1-B, 1-C and 1-D; and opposite parties 1 to 5 represent the mortgagors under other mortgages with which we are not now concerned. Respondents 1 to 5, though they filed a written statement, remained *ex parte*. Respondents 6 to 12 contested the petition. They not only questioned the correctness of the amount claimed as due from them but also pleaded that the claim under the mortgages was barred by limitation.

The learned Subordinate Judge held that the claimant had proved his claim *ex parte* against the opposite parties Nos. 1 to 5; so far as the appellants were concerned he held that a sum of Rs. 8,50,253 towards principal and Rs. 1,17,625 towards interest were due from them under Exhibits 1-B, 1-C and 1-D. But he held that the claim in respect of the said 3 mortgages was barred by limitation. In that view, he dismissed the claim so far as opposite parties 6 to 12 were concerned and allowed it against opposite parties 1 to 5. Kumar Pramatha Nath Roy, i.e., the claimant, and the Trustees of Kumar Pramatha Nath Roy Public Charitable Trust—presumably the Trust was created by the said Roy in respect of the mortgages—preferred an appeal, Claim Appeal No. 61 of 1956, to the High Court of Judicature at Patna, which was the Board appointed under section 17 of the Act and to which appeal lay against an order of the Claims Officer under the Act. The High Court, on a construction of the pleadings, came to the conclusion that the claim was based on the mortgage decree of the Pakistan High Court and, therefore, it was within

time under section 117 of the Limitation Act. As regards the amount claimed, observing that the learned Counsel for the parties had not challenged the correctness of the finding of the learned Claims Officer so far as the amount payable to the claimant was concerned, it affirmed the amount declared by the said Officer as due from the appellants.

This appeal is filed against that order by the opposite parties 6 to 12 after obtaining the Special Leave of this Court. We are not concerned in this appeal with the rights of opposite parties 1 to 5, as they are not parties in this appeal.

Mr A V Viswanatha Sastri, learned Counsel for the appellants raised before us the following 2 points: (1) The respondents made a claim only on the basis of the mortgage deeds and, therefore, the High Court went wrong in giving them a relief on a new cause of action, namely, the foreign judgment of the Pakistan High Court, and (2) even if the High Court was right in that regard, it went wrong in accepting the finding of the Subordinate Judge as regards the amount due from them on a misapprehension that the appellants had not challenged the correctness of the finding of the learned Subordinate Judge in that regard.

Mr B Sen, appearing for the respondents while supporting the findings of the High Court, contended that in case a remand to the Claims Officer was necessary it should be made clear that the question whether and to what extent the findings of the High Court of Pakistan would be binding on the Claims Officer should be left open to the decision of the said Officer.

The first question turns upon the pleadings in the case, having regard to the relevant provisions of the Act. At the outset it would be convenient to notice the relevant provisions of the Act.

**Section 14 (1)**—Every creditor whose debt is secured by the mortgage of, or is a charge on, any estate or tenure or part thereof vested in the State under section 3 or 3 A may within six months of date of such vesting or the date on which such creditor is dispossessed under the provisions of clause (g) of section 4 or within three months from the date of appointment of the Claims Officer, whichever date is later, notify in the prescribed manner his claim in writing to a Claims Officer to be appointed by the State Government for the purpose of determining the amount of debt legally and justly payable to each creditor in respect of his claim.

**Section 15**—Every creditor submitting his claim in compliance with the provisions of section 14 shall furnish along with his written statement of claims full particulars thereof and shall, within such time as the Claims Officer may appoint, produce all documents which are in his possession, power or control (including entries in books of accounts) on which he relies to support his claim, together with a true copy of every such document.

**Section 16 (1)** The Claims Officer shall in accordance with the Rules to be made under this Act, determine the principal amount justly due to each creditor and the interest (if any) due at the date of such determination in respect of such principal amount.

(2) In determining the principal amount and interest under sub-section (1), the Claims Officer shall proceed in the following manner:—

(a) he shall ascertain the amount of the principal originally advanced in each case irrespective of the closing of accounts, execution of fresh bonds, of decree or order of a Court.

The gist of the said provisions relevant to the present enquiry may be stated thus: Every creditor whose debt is secured by a mortgage of any estate may file a claim within 6 months of the date of the vesting of the said estate in the State. He shall furnish along with his claim the full particulars thereof. He shall produce all his documents on which he relies to support his claim within time appointed by the Claims Officer. The Claims Officer then in accordance with the rules prescribed determines the principal amount due on the mortgage irrespective of the closing of accounts, execution of fresh bonds, of decree or order of a Court. It will be noticed that under the scheme of the said provisions the claimant shall give the particulars of the mortgage, and the Claims Officer for the purpose of ascertaining the amount due thereon under the provisions of the Act and the Rules made thereunder is empowered to reopen even a decree made on the basis of the said mortgage. Section 14 fixes the period of limitation of 6 months from the date prescribed thereunder for making such a claim. It is no doubt implicit in the provisions that the claim to recover the amount under the mortgage should be subsisting, that is to say, it should not have become barred. But whether the claim on the mortgage is barred

or not may also depend upon another question whether a decree has been obtained on the said mortgage or not. If no suit has been filed, the Claims Officer will have to ascertain whether on the date the claim is made a suit to enforce that mortgage is barred. If a decree has been obtained, the Claims Officer will have to ascertain whether on the date the claim is made the decree has become barred. If this distinction between the limitation prescribed under the Act for making a claim under section 14 of the Act and the bar of the claim outside the Act is borne in mind, much of the confusion raised in this case would disappear. To put it differently, when a claim is made before the Claims Officer, he has to consider two questions, namely, (i) whether the claim is made within 6 months from the prescribed date; and (ii) if it is so made whether the claim to recover the amount is barred by limitation. If he is satisfied that it is in time either because the mortgage claim is within the prescribed time or because the decree is not barred by limitation, he proceeds to ascertain the amount due under the mortgage in the manner prescribed by the Act and the Rules made thereunder and, if a decree is made, even by reopening it.

With this background let us look at the claim petition. In the claim petition the particulars of the mortgages were given, the amounts payable under each of the mortgages were stated, the fact that a suit was filed in the Court of the Subordinate Judge, Dinajpur, and that it finally ended in a decree by the Dacca High Court was mentioned. It is true that the mortgage decree made by the Pakistan High Court was not filed before the Claims Officer, but the respondents 6 to 12 in their written statement gave all the particulars of the amounts payable by them under the mortgage debts, referred to the suit and the appeal in the Subordinate Judge's Court and the Pakistan High Court, relied upon the findings of the High Court in support of their case and even filed the decree of the High Court before the Claims Officer. If the decree was not filed by the opposite party, the claimant might have filed it within such time as the Claims Officer might appoint under section 15 of the Act. In the circumstances we are satisfied that the particulars given in the claim petition satisfy the provisions of the Act and the Claims Officer could entertain that claim and reopen the decree to ascertain the amount in terms of the provisions of the Act.

That apart, even if the claim shall be specifically based upon the decree, we agree with the High Court that on a fair reading of the pleadings it can reasonably be held that the claim was also made on the basis of the decree. The mortgagee in the claim petition filed by him expressly stated in paragraph 9 thereof that a decree was obtained on the mortgages. In the written statements that fact was admitted. It is true that the High Court made a mistake when it stated that the appellants raised the question that the claim petition could not be allowed because the mortgage bonds had already been sued upon and a decree was passed in favour of the claimant. This statement was made in the written statement of the opposite parties 1 to 5 and not in that of opposite parties 6 to 12. But before the Subordinate Judge the opposite parties 6 to 12 argued that the claim was based on the judgment and decree of the High Court of Pakistan and as such the application was not maintainable. It is, therefore, clear that even the appellants understood the claim as based upon the judgment and decree of the said High Court. In the circumstances when all the necessary facts are alleged in the claim petition and when the opposite parties themselves understood the claim as based upon the decree, the High Court was quite justified in holding that the claim was also, in substance, based on the foreign decree.

In either view the question is whether the decree was barred by limitation. It is not disputed by Mr. Viswanatha Sastri that if the claim was based upon the foreign judgment, it would be within time under Article 117 of the Limitation Act.

The next question is whether the High Court was right in holding that the parties had not challenged the correctness of the finding of the Claims Officer so far as the amount payable was concerned. In the petition for Special Leave Ground 13 reads :

"That in arguing the appeal, the Advocate appearing on behalf of the appellants claimed that the appeal should be remanded so that the Claims Officer may pass an order allowing the claims



based on the foreign judgment and therefore the petitioners did not advance any argument with regard to the consideration of the three mortgage bonds

In paragraph 13 of the Statement of Case filed by the appellants the same contention was raised. It reads

While arguing the appeal before the Board the learned Advocate for the respondents argued that the claim is not barred by limitation and proposed that the appeal be remanded to the Claims Officer to pass an order allowing the claim to be based on the foreign judgment and thus the appellants only argued the question of limitation and did not argue with respect to the consideration of the mortgage bonds.

In paragraph 11 of the Statement of Case filed by the respondents this position was practically accepted. It is stated therein

It was also urged alternatively that if there was any difficulty felt in allowing the claim of the applicant on the ground that the opposite parties did not avail of the opportunity to contest the claim thoroughly under some misapprehension then the Court at best, could only remand the matter to the Claims Officer giving them fresh opportunity

That apart, even in the earlier part of the judgment of the High Court, it observed

The only question for consideration is whether the present proceeding can be held to have taken place of a suit on a foreign judgment or this would be a proceeding on the basis of the original mortgage bonds themselves. Learned Counsel for the parties accordingly have argued in support of their respective standpoint on this matter only

Thus is also consistent with the contention of the appellants. In the circumstances we are satisfied that the High Court was under some misapprehension when it accepted the finding of the Claims Officer in regard to the amount payable to the claimant.

Mr Viswanatha Sastri further contended that in working out the amounts due to the claimant from the appellants the Claims Officer is bound by the findings given by the Pakistan High Court. It was also brought to our notice that by reason of the Indian High Courts Order, 1947, the judgment of the Pakistan High Court had to be treated as the judgments of the Calcutta High Court. Mr Sen appearing for the respondents, did not concede the position in regard to the findings of the High Court. We do not propose to express any opinion on this question.

This question is left open for the decision by the Claims Officer when he determines the amount due to the claimant.

In the result, the appeal is allowed in part. The order of the High Court is set aside and the appeal is remanded to the Claims Officer for determining the amount due to the respondents under section 16 of the Act. As the parties failed and succeeded in part, they will bear their own costs in this Court.

K S

*Appeal allowed in part*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, J. R. MUDHOLKAR, and R. S. BACHAWAT, JJ.

The State of Madras

v.

P. Govindarajulu Naidu

.. Appellant\*

.. Respondent.

*Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), sections 2 (15), (16) and 3—Madras Estates Land Act (I of 1908), section 3 (2) (c)—Mothirambedu village in Madras State—If zamin estate or under-tenure estate—Notification under section 3 of Act XXVI of 1948 taking over the said estate as zamin estate—Validity.*

In 1796 the then Collector of the Honourable Company's Jagheer granted a cowle to one R, who was occupying the office of a *Nattuar* conferring on him the mirasi of Mothirambedu village in the Chingleput District in the State of Madras, subject to his paying all just dues. At the time of the making of the permanent settlement in Chingleput District, which was then described as a Jagir, it was decided by the Company to maintain shrotriem, i.e., grants made to *Nattuars*, including those granted to R, and realise their dues through the instrumentality of the zamindar. This policy was implemented by including the shrotriems in the zamindari by transferring the Company's ultimate reversionary rights to the zamindar. The result was that the shrotriem tenure in the hands of the *Nattuars* continued after the permanent settlement as it existed prior to it. That is the reason why sometimes the village was described as zamin village and sometimes as Jari Inam village. That is also why it was not the subject-matter of permanent inam settlement. But the fact remains that shrotriem tenure continued in the hands of the *Nattuar* and his successors-in-interest, after the permanent settlement as it was before the said settlement. The tenure under the Government became an under-tenure under the zamindar, as the zamindar intervened between the Government and the *Nattuar*. Thus as the Mothirambedu village is held under a permanent under-tenure, it falls squarely under the definition of section 3 (2) (c) of the Madras Estates Land Act and is therefore an estate thereunder and hence it is an under-tenure estate. As the under-tenure estate is excluded from the definition of "zamin estate", the notification issued under section 3 of the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, by the Government of Madras taking over the Mothirambedu village as a zamin estate is illegal and void.

Appeal from the Judgment and Decree, dated the 9th September, 1958, of the Madras High Court in Appeal Suit No. 85 of 1956.†

*A. Ranganadham Chetty*, Senior Advocate, (*A. V. Rangan*, Advocate, with him), for Appellant.

*T. V. R. Tatachari*, Advocate, for Respondent.

The Judgment of the Court was delivered by

*Subba Rao, J.*—This appeal by certificate raises the question whether the village of Mothirambedu is a zamindari estate under the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948 (Madras Act XXVI of 1948), herein-after called the Act.

The facts may be briefly stated. Mothirambedu village is one of the shrotriem villages in the Chingleput District in the State of Madras. The respondent purchased the same from one P. Ananthapadmanabachari under a sale deed, dated 10th July, 1946, for a sum of Rs. 26,000, and was in possession and enjoyment thereof. On 12th December, 1950, the Government of Madras issued a notification under section 3 of the Act taking over the said village as a zamin estate. The Government took possession of the same on 3rd January, 1951. On 15th

23rd September, 1965.

\*CA No. 446 of 1963.

† (1959) 1 M.L.J. 323.

March, 1954, the respondent filed O S No 22 of 1954 in the Court of the Subordinate Judge Chingleput, against the State of Madras for a declaration that the said notification of his village as zamindari estate under the said Act was illegal and void. In the plaint he claimed that the said village was not an "estate" within the meaning of the Madras Estates Land Act and therefore it did not vest in the State. But that plea was subsequently given up and nothing need be said in that regard. The State filed a written statement asserting that the said village formed part of Tirumazhy Zamindari that it was separately registered in the office of the Collector and that, therefore it was a zamin estate within the meaning of the said Act.

The learned Subordinate Judge, Chingleput held that the said village was a zamin estate and that therefore the said notification was legal and binding on the respondent. On appeal the High Court of Judicature at Madras held that it was not proved that the said village was a zamin village, but it was a whole inam village. On that finding it granted the plaintiff a declaration that the notification of the said village as a zamin estate under the Act was illegal and void, as the said village was a whole inam village. Hence the appeal.

Learned Counsel for the State contended that the said village was included in the assets of the zamindari at the time of the permanent settlement that it continued to be a part of the said estate till it was abolished under the Act.

Mr T V R Tatachary, learned Counsel for the respondent, on the other hand argued that the said village was granted *inam* before the permanent settlement to a person holding the office of a *Nattuvār*, that though the said village was included in the assets of the zamindari the pre-existing tenure was not disturbed and that the grantee and his successors continued to hold the village as an under tenure from the zamindar, as by reason of the permanent settlement the zamindar became an intermediary. In short, his contention was that the said village was an under tenure estate falling under section 3 (2) (e) of the Madras Estates Land Act and that in any view it had not been established that it was a zamin village.

Before we advert to the facts of the case it will be convenient to notice some of the aspects of law relevant to the said facts.

#### *The Madras Estates Land Act 1903*

##### *Section 3 (2) Estate means—*

- (a) any permanently settled estate or temporarily settled zamindari
- (b) any portion of such permanently settled estate or temporarily settled zamindari which is separately registered in the office of the Collector,

(c)

(d) *(As it stood before the Amending Act XVIII of 1936)*

any village of which the Land revenue alone has been granted in *inam* to a person not owning the *inam* *waram* thereof provided that the grant has been made confirmed or recognized by the British Government or any separated part of a village.

##### *(After the Amending Act XVIII of 1936)*

any inam village of which the grant has been made confirmed or recognized by the British Government, notwithstanding that subsequent to the grant the village has been partitioned among the grantees or the successors-in-title of the grantee or grantees.

- (e) any portion consisting of one or more villages of any of the estates specified in clauses (a) and (c) which is held on a permanent under tenure.

#### *The Act*

##### *Section 2 (3) "estate" means a zamindari or an under tenure or an inam estate*

(7) "inam estate" means an estate within the meaning of section 3 clause (2) (d) of the Estates Land Act but does not include an inam village which became an estate by virtue of the Madras Estates Land (Third Amendment) Act 1936.

(15) "under-tenure estate" means an estate within the meaning of section 3, clause (2) (e) of the Estates Land Act.

\* \* \* \* \*

(16) "zamindari estate" means—

(i) an estate within the meaning of section 3, clause (2) (a), of the Estates Land Act, after excluding therefrom every portion which is itself an estate under section 3, clause 2 (b) or 2 (e) of that Act; or

(ii) an estate within the meaning of section 3, clause 2 (b) or 2 (e), of the Estates Land Act, after excluding therefrom every portion which is itself an estate under section 3, clause 2 (e) of that Act.

The aforesaid provisions may be summarized thus: The Madras Estates Land Act recognizes for the purpose of that Act 5 categories of estates. The Act grouped the said 5 estates under three categories, namely, zamin, under-tenure and inam estates. The estates defined in clauses (a), (b) and (c) of section 3 (2) of the Madras Estates Land Act, excluding therefrom an under-tenure estate, are classified as zamin estates. An estate falling under the definition in section 3 (2) (d) of the Madras Estates Land Act, excluding therefrom an inam estate which became an estate under the Madras Estates (Third Amendment) Act, 1936, is described as an inam estate under the Act. An estate under the definition of section 3 (2) (e) of the Estates Land Act is brought under the definition of the "under-tenure estate" under the Act. It will be noticed at this stage that though a village is physically a part of a zamindari if it is held on a permanent under-tenure, it is excluded from the definition of a zamin estate but included under the definition of an "under-tenure estate". The result of this classification is, an inam village held under a permanent under-tenure is not a zamin estate. A village can be held under a permanent under-tenure whether that village was the subject-matter of a pre-settlement grant or a post-settlement grant. To illustrate: take a village which was granted permanently to an inamdar before 1802 by the British Government. At the time of the permanent settlement the said village was included in the permanently settled estate. The effect of that was that the inamdar who was holding the village under the Government continued to hold the same under the proprietor. Take another illustration: after the permanent settlement the proprietor made a permanent grant of the whole inam village to an inamdar. The inamdar held the village under the zamindar. In either case the village was held under the proprietor of the permanently settled estate. The proprietor, who is liable to pay *peish kush* to the Government, is the tenure-holder. He is the intermediary between the inamdar and the Government: that is why the inamdar is described as under-tenure holder. It is, therefore, clear that to constitute an under-tenure it is not material whether the grant was a pre-settlement or a post-settlement one, but what is important is, in whom the reversionary interest rests. That reversionary interest may rest in the proprietor either because at the permanent settlement the inam was included in the assets of the zamindari or because he himself was the grantor of a permanent under-tenure. This aspect of the law was considered in two decisions of the Madras High Court. Where a pre-settlement Mokhasa village was included in the assets of the zamindari it was held that the village was held under a permanent under-tenure within the meaning of section 3 (2) (e) of the Madras Estates Land Act: see *Gopisetti Veeraswami v. Sagiraju Seetharama Kantayya* <sup>1</sup>, and *Narayanaswami Bahadur v. Boda Thammayya* <sup>2</sup>. This legal position will be material when we consider the documents filed in this case.

It may be mentioned that the distinction between "zamin estate", "inam estate" and "under-tenure estate" made under the Act is relevant, *inter alia*, for the purpose of payment of compensation. The basis on which compensation payable in respect of an inam estate is to be calculated would yield a larger measure of compensation than that in respect of a

1. (1926) 51 M.L.J. 394.

2. (1930) M.W.N. 945.

zamin estate. In regard to an under tenure estate if the under tenure was created prior to the permanent settlement the compensation payable would be on the basis adopted for zamin estate with certain deductions, if it was created subsequent to the permanent settlement the compensation would be on the basis adopted for a zamin estate. In the present case as the inam was created prior to the permanent settlement if the contention of the respondent was correct he would get a higher compensation. That is the reason for this dispute (See sections 27 28 31 32, 35 36 and 37 of the Act)

It will also be useful to know as we said for appreciating the evidence who is a *Nattuar*. *Nattuar* or *Natuar* is described in the Manual of Chingleput District thus, at p 244

The first and highest officer was the *Natwar* or headman of a *Nadu*, or circle of villages the cultivation of which he supervised on the part of the Government. These officers were possessed of considerable privileges and were men of great dignity and reputed wealth. They appear to have been lost sight of after the territory was made over to the British. The Nabob recognised or ignored them, deprived them of their offices or restored to them their privileges as they rested or fell in with his exacting, or as his rapacity was sharpened by the urgency of his necessities. Such a system had demoralised what was really a very useful body of men who were moreover eager to be relieved from the consequences of the ascendancy of the dubashes which had reduced them to the condition of ordinary ryots. Mr Place took advantage of the disposition they now showed to return to the discharge of their duties to which he therefore restored them under certain guarantees for their good behaviour.

'The *Natwars*' were a very ancient body of officials. It will be seen from the said extract that the office of *Nattuar* was so important one that it possessed of considerable privileges that it fell into evil days during the period of the Nawabs and that during the British rule Mr Place, the then Collector of Chingleput restored the office of *Nattuar* under certain guarantees for the good behaviour of the *Nattuars*. It appears that at the time of permanent settlement in the Chingleput District which was then described as a *Jagir* the office of *Nattuar* was abolished but the *Nattuars* were allowed to retain the shrotr em villages granted to them. This will appear from the Appendices to the Report of the Estates Land Committee at pp 228 to 253. Learned Counsel for both the parties agreed that the extracts given in the Statement of Case of the respondent are correct. As the report is not available to us we cite the extracts from the said Statement of Case.

#### *Paragraph 66 of the said Appendices*

"The permanent settlement of the land revenue having rendered unnecessary all the subordinate officers of revenue between the Collectors and the *Curnums* the general instructions directed that those superfluous offices including that of *Nattuar* should be abolished. The nature of the powers exercised under the duties attached to that office furnish abundant reason for annulling it but the individual persons now holding it have claim to indulgence and it is our duty to submit their pretensions to your Lordship's consideration. They have been considered to be honorable stations and length of possession has annexed to them the idea of property although the emoluments of an office ought under ordinary circumstances to cease with the discontinuance of the office itself yet it will be just under stated consideration, to grant a compensation in the case of the *Nattuars* adequate to the loss sustained by the immediate incumbents. We recommend that your Lordship in Council should confer on them as an act of indulgence the possession of their *Shrotr em* lands tenable under a *Purwarrah* of Government."

*Paragraph 67* — Although the *Nattuars* who were appointed under the authority of Government during Mr Place's management of the *Jagheer* cannot plead length of service we yet recommend that they might be included in this arrangement in consideration of the assistance rendered by them in the lease of the lands at that period of time.

*Paragraph 74* — The *Shrotr em* lands in general are so connected with the Government lands that it has been deemed expedient to provide for the collection of the *shrotr em* rent through the channel of the proprietor of the estate in which the *shrotr em* lands are situated and to provide through the same channel for the collection of the commuted *maraha*. The *Zarundars* will therefore be entitled (according to usage) subject always to prosecution for the abuse of it to call in the aid of the inhabitants of the *shrotr em* lands for purposes for which it has been customary to rely on such assistance."

The following extracts from the Minutes of Consultation in the Revenue Department, dated April 13, 1802, may be useful:

"The subject of the Nauttavars is familiar to the Board. The nature of the office and its connection with the administration of the Revenue has been discussed at length on the records of the Government. A reference to this discussion must demonstrate that the office can no longer be useful. The superior advantages which the Nauttavars have acquired by the enjoyment of the high warum and of mauniams, and the ground of interference which they are calculated to afford with the rights of the proprietor, render it expedient that the motives of such an influence should be removed together with the office. The Board, therefore, authorise the abolition of the office of Nauttavar and the resumption of the emoluments attached to the performance of the duties of that office.

At the period, however, of conferring such extensive benefit on the body of people as they will receive from the establishment of a system of permanent revenue and of judicature, the Board are disposed favourably to consider the claims of the present incumbents in the office of Nauttavar. They concur with the Commission that it will be just, under the stated circumstances, to continue to the Nauttavars their Shrotriem lands; because they have been considered to be honourable stations and length of possession has annexed to them idea of property."

It will be seen from the said extracts that the Commission appointed to go into the question of the abolition of the office of *Nattuvars* recommended that the office should be abolished but the Government should confer on the incumbents the possession of their shrotriem lands under a *purvana*. The Revenue Board accepted the recommendation of the Commission; it agreed to allow the *Nattuvars* to continue to have possession of their shrotriem lands. It is, therefore, clear that the shrotriem lands were given permanently to *Nattuvars* by the State, that at the time of permanent settlement the tenure was continued and that their inclusion in the estate only effected a transfer of the reversionary interest from the State to the Proprietor.

With this background let us look at the documents filed in the case. The earliest document on record is Exhibit 7, the certified copy of cowle granted by Mr. Lionel Place, Collector of Honorable Company's Jagheer to Rangasami Mudali, dated December 10, 1796. As it is an important document, we shall read it:

"Cowle granted by Lionel Place Esq., Collector of the Honourable Company's Jagheer to Rangaswamy Moodaly.

Whereas the villages of Moderambedu and Madavapoondy in the district of Poonamalle from neglect and want of mirasdarsh being in a desolate and uncultivated state producing nothing to the circar, Rangaswamy Mudaly Nautawar of the said district having agreed, provided the meerassee of the said villages be conferred on him, to clear and render them productive.

I do therefore hereby confer on Rangaswamy Mudaly and his heirs the meerassee of the said villages, to continue in the enjoyment of the same, so long as they carry on a proper cultivation, pay all just dues, and are obedient to the circar.

Dated this 10th day of December in the year one thousand seven hundred and ninety six.

(signed) Lionel Place, Collector."

The genuineness of this document is not in question. It was filed by consent. This document discloses that Rangaswamy Mudali was a *Nattuvar* in the District of Poonamalle. As the village of Mothirambedu, with which we are now concerned, was in a "desolate and uncultivated state" for want of mirasdar, the mirasi of the said village was granted permanently to Rangaswami Mudali and his heirs. In Wilson's Glossary, the following meaning to the Tamil expression "mirasi" is given:

"Inheritance, inherited property or right; the term is used, especially in the south of India, to signify lands held by absolute hereditary proprietorship under one of three contingencies."

According to Wilson, mirasdar means the holder of hereditary lands or office in a village. It is, therefore, clear that under this document the said village of Mothirambedu was given to Rangaswami Mudali, who was a village officer, in absolute hereditary proprietorship. The village was given under a permanent hereditary grant, subject to, *inter alia*, the grantee paying all just dues to the Government. This document is couched in clear and unambiguous terms and

under it the permanent inam was granted to Rangaswamy Mudali subject to his payment of dues

Exhibit B 2 is described as "Trimishy Zamindari Statement" in regard to waste and unproductive lands. It is not dated. It relates to Mothrambedu village and another village. Under the heading "remarks", the following statements are found

Watered by Trimishy tank, New Shrotriem to Nautyavalappa Mooduly proposed to be resumed as per Order of the Board dated 2nd October, 1800. Another village Alatoor is included with these two and the rent is paid on the whole and the villages are watered by the Trimishy tank. Rented for 10 years to Naut Rangaswamy Mooduly 5 of which are expired. The rent raised from 10 pagodas the present Fasli to 25 Pagodas the last year by the lease. Watered by the Trimashe tank.

Learned Counsel for the State contends that this document shows that Exhibit A 7 was not given to and that Rangaswamy Mudali was only a lessee for 10 years. As we have stated earlier, this statement does not bear any date, though the internal evidence discloses that it came into existence after 2nd October, 1800. This is not signed by any officer. We do not know on what material the said observations were made and on what occasion this document was prepared and by whom and whether this was acted upon at the time of permanent settlement. We cannot draw any presumption on an unsigned statement which does not even bear a date. This must, therefore, be ignored.

Exhibit B 1 is the copy of the Kabuliya executed by Venkiah, the proprietor of the zamindari of Tirumishi at the time of a permanent settlement of the estate in his favour. The sannad is not produced. It shows that the zamindari consisted of 57 purchased villages and 8 Shrotriem villages, but the names of the Shrotriem villages are not given. This document *ex facie* does not show that Mothrambedu was one of the villages that were the subject matter of permanent settlement. The learned Counsel for the State relied upon the Chingleput Manual wherein a statement showing the particulars of several tenures other than ryotwari in the District of Chingleput is given. Dealing with Saidapet Taluk under the heading "Zamindaries", Mothrambedu village is mentioned, and under the heading "inam villages, enfranchised or unenfranchised," the said village is not shown. From this it is contended that this village was a part of the zamindari and that it must have been one of the shrotriem villages shown as included in the zamindari of Tirumishi in the Kabuliya executed by Venkiah. Be that as it may, the fact that Shrotriem villages have been shown as villages of the zamindari is not decisive in the context of the Act as permanent under tenure villages, as explained earlier, have been specifically excluded from the definition of zamindari estate.

Exhibit B-3 does not bear any date. It contains the names of the zamindars in the Madras Presidency. We do not know for what purpose this document was prepared. Under the heading "names of estates", Mothrambedu is given. The name of P. Ananthapadmanabhan is shown under the heading "Name of the present holder". Apart from the heading, the expression "estate" is appropriate in the context of a zamindari as well as a village held under a permanent under tenure. The honorific title "zamindar" adopted by a particular inamdar does not make him a zamindar and his land does not cease to be an inam. It is either an inam or not under the provisions of the Act.

Exhibits B-4 and B 5 are the extracts from the Inam Fair Register of the year 1862 in respect Mothrambedu village. They deal with some minor inams of small extents. It may be mentioned at this stage that these registers were prepared in connection with the inam settlement. They deal with pre settlement inams only, which were not included in the assets of the zamindari. Presumably these minor inams in Mothrambedu village were pre settlement inams not so included and, therefore, they were the subject matter of the enquiry and were eventually confirmed. But it is said that the fact that the minor inams were the

subject-matter of the settlement but the village itself was not settled thereunder indicates that the village was a part of the zamindari. But, as we have pointed out earlier, the village, subject to the subsisting tenure, was included in the zamindari and therefore, there was no scope nor occasion for its being the subject-matter of inam settlement.

Exhibit A-2 is the title-deed granted to Narasimhachariar and 7 others by the Inam Commissioner, Madras, dated 24th November, 1869. The title deed was issued to Narasimhachariar in respect of 2 acres and 39 cents of wet land pursuant to orders made in the Inam Register. But the said 2 acres and 39 cents of wet land is described as situated in the Jari Inam village of Mothirambedu taluk of Saidapet District. According to Wilson's Glossary, "Jari Inam" means "A grant of land or other endowment still in force, not resumed." This recital, therefore, supports the conclusion that the inam of the village of Mothirambedu taluk was still subsisting, though the right of ultimate reversion vested in the zamindar.

Exhibit B-6 is "B" Register of Sriperumbudur Taluk of Chingleput District. It contains a list of then inam villages. Mothirambedu minor inam is shown in the list as it should be. Mothirambedu village has no place in that list as it was included in the zamindari.

The respondent placed before the Court various sale deeds to support his title to the said village. Under Exhibit A-6, a sale-deed dated, 2nd September, 1919, Haji Usman Sahib sold the exclusive miras of Mothirambedu to Rangachariar. In the sale deed Mothirambedu is described in different places as Miras Mitta, Zamin village, Mothirambedu Zamin village, and Mothirambedu Ega Bhoga Miras zamin. "Ega Bhogam" means in Tamil possession or tenure of village land by one person or family without any co-sharer. No doubt the word "zamin" is ordinarily used to denote the estate of zamindar, that is the proprietor under the permanent settlement. But the expression "zamindar" is also adopted by some of the inamdars as an honorific term. A mere popular description of an under-tenure village as a zamin does not make it a zamin estate under the Act, if it is not one in fact. Indeed, the document shows that in some parts, for instance in Schedule A. Mothirambedu has been described as Ega Bhoga Miras Mothirambedu zamin village and in Schedule B, Melmanambedu village is described as Shrotriem Melmanambedu village, whereas in the preamble to the document Mothirambedu is described as Miras of Mothirambedu, and Melmanambedu, as Zamin Melmanambedu. This shows that the character of the village has not been described with any legal precision. What is more, the character of this village was in dispute in a suit between the zamindar and the tenants in the year 1921. That suit ultimately went up to the High Court and a Division Bench of the Madras High Court disposed of the appeal on 23rd November, 1927. The judgment is marked as a Exhibit A-4. Therein the High Court pointed out that the zamindar, who was the appellant, did not produce the sannad nor did he file any old records relating to the zamindari on the ground that they were not available in the Collector's office. The only evidence adduced to support his contention was the fact that in regard to the village fixed assessment was paid from the year 1856 onwards, and that it was referred to in certain Government registers as zamin village. The High Court accepted the finding of the Subordinate Judge that it was not a part of the zamindari. Except the certified copy of the Kabuliati executed by Venkiah, the then zamindar, which does not include this village and the unsigned statement alleged to have been filed in the permanent settlement proceedings, which is not proved, no further material evidence has been placed in the present proceedings. We do not see any justification to take a different view from that accepted by the High Court in the year 1927.

From the discussion of the aforesaid evidence, the following facts emerge: In 1796 Mr. Lionel Place, the then Collector of the Honourable Company's Jagheer, granted a cowle to Rangaswamy Mudali, who was occupying the office of a *Nattuvar*,



conferring on him the mirasī of Mothurambedu village and another village permanently, subject to his paying all just dues. At the time of the making of the permanent settlement in Chingleput District, which was then described as a Jagir it was decided by the Company to maintain Shrotriems, i.e. grants made to *Nattuvārs* including those granted by Mr Lionel Place and realise their dues through the instrumentality of the zamindar. This policy was implemented by including the shrotriems in the zamindari by transferring the Company's ultimate reversionary rights to the zamindar. The result was that the shrotriem tenure in the hands of the *Nattuvārs* continued after the permanent settlement as it existed prior to it. That is the reason why sometimes the village was described as zamin village and sometimes as Jari Inam village. That is also why it was not the subject matter of permanent inam settlement. But the fact remains that Shrotriem tenure continued in the hands of the *Nattuvār* and his successors in interest after the permanent settlement as it was before the said settlement. The tenure under the Government became an under tenure under the zamindar, as the zamindar intervened between the Government and the *Nattuvār*. As the village is held under a permanent under tenure, it falls squarely under the definition of section 3 (2) (e) of the Madras Estates Land Act and is therefore, an estate thereunder and hence it is an under tenure estate. As the under tenure estate is excluded from the definition of "zamin estate", the notification issued by the Government on the basis that it is a zamin estate is void and the High Court rightly declared it as void.

In the result, the appeal fails and is dismissed with costs.

V K.

*Appeal dismissed*

## THE SUPREME COURT OF INDIA (Civil Appellate Jurisdiction.)

PRESENT :—A K SARKAR, RAGHUBAR DAYAL, and V RAMASWAMI, JJ

Biram Prakash and others

*Appellants\**

v

Narendra Dass and others

*Respondents*

*Math—Expenses of suit by the rightful claimant to Gaddi—Burden on the Math and its properties—Mortgage by the Mathadhipati to secure payment of such debts—Alienation of properties to salvage a part of the property sold under the sale in execution of the mortgage decree—Legal necessity—Test of*

In the instant appeal by Special Leave the appellants raised the following contentions : (i) the Hardwar Dharmashala was a separate endowment from the Gaddi Shanter Shah (ii) that mortgage of 1933 was not for a binding debt (iii) that the sale of major portion of the Dharmashala in 1945 was not supported by legal necessity.

*Held* in view of the evidence on record (discussed in the judgment) the concurrent finding of the Courts below that the Hardwar Dharmashala was not a separate endowment but was part of the Gaddi Shanter Shah has to be accepted.

Where a lawful Mathadhipati is kept out of the endowed property by a trespasser asserting a false claim there is a hostile title in the litigation against the Math itself. In the litigation suits Nos. 135 of 1915 and 70 of 1925 the expenses incurred by the successful Heads of the Math must be held to have been incurred in repelling a hostile attack on the trust property. This is also borne out by the circumstance that none of the succeeding Mahants challenged the mortgage of 1933 as also the other circumstance that the Akhara the high command of the Udasi sect proceeded on the basis that the cost of litigation was a legitimate charge on the properties. The mortgage transaction of 1933 executed by Sahib Dass the Mahant is supported by legal necessity.

In testing the legal necessity of the impugned transaction of sale, regard must be paid to the actual pressure on the estate, the immediate danger to be averted or the benefit to be conferred upon the trust estate. Judged by this test the sale of 14th June, 1945, in favour of respondents 3 and 4 was supported by legal necessity and was beneficial to the Gaddi of Shanter Shah; for otherwise the portion of the Dharamshala which was saved by the said sale would have been lost irrevocably to the trust.

Case-law referred.

Appeal by Special Leave from the Judgment and Decree, dated the 13th November, 1959, of the Allahabad High Court in First Appeal No. 342 of 1948.

*Purushottam Trikindas and Raghbir Singh*, Senior Advocates, (*B. C. Misra*, Advocate, with them) for Appellants Nos. 1 and 2.

*Gopinath Kimzru and Raghbir Singh*, Senior Advocates, (*B. C. Misra*, Advocate, with them) for Appellants Nos. 3 and 4.

*A. V. Viswanatha Sastri*, Senior Advocate, (*Naunit Lal*, Advocate, with him) for Respondents Nos. 3 and 4.

The Judgment of the Court was delivered by

*Ramaswami, J.*—This appeal is brought by Special Leave on behalf of the plaintiffs from the judgment and decree of the High Court of Allahabad, dated 13th November, 1959, dismissing First Appeal No. 342 of 1948 arising out of the judgment and decree of the Civil Judge of Saharanpur, dated 6th September, 1948, in Suit No. 64 of 1945.

This suit was brought by the appellants as representing the Udasi sect under Order 1, rule 8 of the Civil Procedure Code in respect of the 'Dharamshala' at Hardwar containing the Samadhi of Baba Bakhat Mal, founder of the Gaddi Shanter Shah which is located in Roorkee Teshil of Saharanpur District. The appellants prayed for a declaration that the Dharamshala was a wakf property and not transferable and that the sale-deed, dated 14th June, 1945, executed by respondents 1 and 2 in favour of respondents 3 and 4 was illegal and inoperative. It was alleged by the appellants that Dharamshala was not part of the Gaddi Shanter Shah but was a separate endowment and the Mahant of Gaddi Shanter Shah had no right to alienate practically the entire dharamshala and destroy the substratum of that endowment. It was stated that respondents 1 and 2 executed the sale-deed to set aside the auction sale of a major part of the Dharamshala in satisfaction of a mortgage decree in suit No. 66 of 1935 obtained by Panchayati Akhara Kalan Kankhal on the basis of a mortgage deed, dated 1st June, 1933, executed by Mahant Saheb Dass. It was also alleged that the mortgage deed to enforce which the decree was passed was not executed by Mahant Saheb Dass for legal necessity and the transaction was not binding on succeeding Mahants. The suit was contested by the respondents on the ground that the Dharamshala at Hardwar was part of the Gaddi Shanter Shah and the mortgage deed executed by Saheb Dass, dated 1st June, 1933, was supported by pressing legal necessity and the sale-deed executed in favour of respondents 3 and 4 on 14th June, 1945, was binding upon the Gaddi of Shanter Shah. It was stated on behalf the respondents that the decree in the mortgage suit being suit No. 66 of 1935 created a binding debt against the Gaddi Shanter Shah and that the impugned sale-deed was executed in order to save the whole of the Dharamshala from passing out of the hands of the Mahant of Gaddi Shanter Shah and the impugned alienation was of a protective character and was for the benefit of the estate of the Mahant of Shanter Shah. It was alleged on behalf of the respondents that the Samadhi of Baba Bakhat Mal and a substantial portion of the Dharamshala had been excluded from the sale-deed, dated 14th June, 1945. It was further alleged that the suit was barred by *res judicata* in view of the compromise in suit No. 3 of 1943.

Upon these rival contentions the Civil Judge of Saharanpur held that the Dharamshala at Hardwar was not a separate endowment but was part and parcel of Gaddi Shanter Shah. The Civil Judge also held that the sale-deed, dated 14th June, 1945, was legally valid as it was executed to discharge the decretal obligation created by the decree in suit No 66 of 1935 and that the sale transaction was of a defensive character and was beneficial to the estate of the Gaddi Shanter Shah. It was accordingly held by the Civil Judge that the sale-deed, dated 14th June, 1945, was executed for legal necessity and for adequate consideration. The Civil Judge also found that the suit was barred by section 11 of the Civil Procedure Code on account of the compromise decree in suit No 3 of 1943. The Civil Judge accordingly dismissed the suit. Against the judgment and decree of the Civil Judge the plaintiffs preferred First Appeal No 342 of 1948 in the Allahabad High Court which dismissed the appeal by its judgment and decree, dated 13th November, 1959. The High Court confirmed the finding of the Civil Judge that the Dharamshala was not a separate endowment but was part and parcel of the Gaddi Shanter Shah. The High Court also took the view that the sale-deed of 14th June, 1945, was justified by legal necessity and was therefore legally valid. The High Court, however, differed from the trial Court on the question of *res judicata* and held that the decision in suit No 3 of 1943 did not operate as *res judicata* in the present suit.

In support of this appeal Mr Purshottam Triumdas contended, in the first place that the Dharamshala at Hardwar was a separate endowment from the Math of Shanter Shah and the Mahant of Shanter Shah could not alienate the major part of the Dharamshala and destroy the substratum of that separate endowment. We do not think there is any warrant for accepting this argument. Both the lower Courts have concurrently found that the Dharamshala at Hardwar was not independent of the endowment of Gaddi Shanter Shah but that it was only a part of the property of the Mahant of Shanter Shah. In our opinion the finding of the lower Courts is supported by adequate evidence. It is the admitted position that Baba Bakhat Mal was the founder of Gaddi Shanter Shah which was a Math intended for the initiation of disciples into the mysteries of the Udasi cult and for imparting spiritual knowledge of the Udasi cult. Exhibit 14 is copy of a proceeding under Act II of 1819 and Act III of 1838. In the course of this proceeding Sant Das of Shanter Shah Math stated that

there was a dharamshala at Hardwar where all the Sadhus who came there from the Punjab east and south were given food and if anybody who happened to come to Siater Shah was given bread and flour.

It is also stated in the proceeding that the village of Shanter Shah had been "a chartered muafi" since the time of Emperor Mohd Shah and that

"the person who was about 75 years old was in the sixth generation from the original donee"

and that

the produce of the village was spent over Sadhabarat and feeding the Faqirs of whom about 50 were then present at Mauza Shanter Shah and Hardwar and those who came from day to day were all fed and that a very large number of Faqirs visit the place during the mela at Hardwar.

It is further stated that

"in the book of Muafi Mohammad Shah Bad Shah is recorded as donor and Mahant Sajal and Sadanand are recorded as donees

and that

"the possession of the Muafidars has been continuing and the person present in possession Garga Das is their disciple and the produce of this village is spent towards the feeding of all the visiting Faqirs at Hardwar."

The document, Exhibit 14 indicates that there were sanads granted by Emperor Mohd Shah to the Mahant of the Shanter Shah Math for meeting the expenses over Sadabarat and feeding the Faqirs at the Dharamshalas at Hardwar.

and Shanter Shah. It is significant to note that the grant was made to the Mahant of Shanter Shah for the maintenance of both the Dharamshalas. In this context it is important to notice that the feeding of disciples and travellers and ascetics is an integral part of the duties of a Mahant. This is apparent from the form of dedication of a math from the text of Varaha Purana quoted by Dr. Mukherjea in his treatise on Hindu Law of Religious and Charitable Trust, Second Edition, at page 32:

"A Math should, by person having faith in the Sastras, be made three-storied or two-storied, consisting of different apartments, accommodated with places for meditation, for study, for burnt offering to consecrated fire and the like. And he should endow a village or sufficient land for meeting the expenses, so that the ascetics and the travellers getting shelter (there), may receive sandals, shoes, umbrellas, small pieces of cloth, and also other necessary things. Thus having established an asylum beneficial to persons practising austerities, and also to other poor people seeking shelter, he should declare—'I am endowing this asylum—May he who is the support of the universe be pleased with me.'"

It is established by the evidence in this case that the Dharamshalas at Hardwar and Shanter Shah and the property of Math of Shanter Shah have always been under one management and have always been dealt with together as one unit. In suit Nos. 135 of 1915 and 70 of 1925 the property of Gaddi Shanter Shah was the subject-matter of the claim between the rival parties and the whole property including the two Dharamshalas constituted the subject-matter of the litigation. In Civil Suit No. 135 of 1915 which was instituted by Sital Das against Saheb Das for recovery of possession of property of Gaddi Shanter Shah the whole Dharamshala at Hardwar was claimed and decreed as part of the Gaddi Shanter Shah and there was an express finding to that effect. In suit No. 70 of 1925 between Mahant Anand Prakash and Saheb Dass the Dharamshala at Hardwar was again claimed as part of the Gaddi Shanter Shah. Under the mortgage deed, dated 1st June, 1933, the Dharamshala was alienated as belonging to the Gaddi Shanter Shah and was sold as such in execution of the decree passed on the basis of the mortgage in suit No. 66 of 1935. In view of this evidence we are of opinion that both the lower Courts have rightly found that the Dharamshala at Hardwar was not a separate endowment but was a part and parcel of the Gaddi Shanter Shah. We are of the opinion that Mr. Purushottam Tricumdas has been unable to make good his submission on this aspect of the case.

We pass on to consider the next question in the case, *viz.*, whether the sale-deed, dated June 14, 1945, executed by respondents 1 and 2 in favour of respondents 3 and 4 is supported by legal necessity and is legally valid. It is necessary at this stage to set out the relevant facts regarding the usufructuary mortgage, dated June 1, 1933 and the course of litigation ending with the sale of the portion of Dharamshala in favour of respondents 3 and 4 on June 14, 1945. Upon the death of Mahant Tulsi Das in 1914, a suit, No. 135 of 1915, was instituted by Mahant Sital Das for the Gaddi against Mahant Saheb Dass, when there was a dispute arising for the Gaddi. The decree, dated September 6, 1918, passed in that suit recognised the right of Sital Das to the post of Mahant. On July 18, 1919, Sital Das executed a mortgage deed for Rs. 10,000 in favour of Panchaiti Akhara Kalan in respect of the money borrowed for the litigation. The debt came to Rs. 30,825 on June 1, 1933. In the year 1923, after the death of Sital Das the dispute again arose between Saheb Das and Anand Prakash for the Gaddi. The suit No. 70 of 1925 filed by Anand Prakash against Saheb Das was decided in favour of the latter. Mahant Saheb Das had also borrowed from Panchaiti Akhara during that litigation. In order to discharge this debt and also the debt due under the mortgage deed, dated July 18, 1919, Mahant Saheb Das executed on June 1, 1933, a mortgage deed with possession of the Dharamshala for Rs. 61,000 but the room occupied by the Samadhi of Baba Bakhat Mal and two other rooms were excluded from the mortgage. On October 21, 1935, Mahant Saheb Das filed suit No. 66 of 1935 against the Akhara under section 33 of the U.P. Agriculturists Relief Act for rendition of account in respect of the mortgage of

1933, and on March 27, 1936, a compromise decree was passed in that suit for Rs 53,500 which was payable in 20 yearly instalments. As there was default in the payment of instalments, the mortgaged property was brought to sale and purchased to Court auction by Panchaiti Akhara on November 17, 1942. The sale was confirmed on November 23, 1943, after an application made on February 6, 1943, by Poorao Das to set aside the execution sale was dismissed. The Panchaiti Akhara obtained possession of the property on November 23, 1943. In the meantime, on February 3, 1943, Narao Das and two others filed suit No 3 of 1943 against the Akhara for a declaration that the Dharamshala was a wakf property and no right accrued to the Akhara through auction-sale and for a permanent injunction restraining the Akhara from taking proceedings for confirmation of sale. On December 4, 1944, Narendra Das filed an application for withdrawing himself from the suit as he had been appointed Mahant of the Gaddi in place of Poorao Das who was removed, and the prayer was granted by the Court. The other two plaintiffs made an application that the suit had been compromised and may be dismissed, and accordingly an order was passed on 7th December, 1944. In First Appeal No 163 of 1943 which was filed against the dismissal of the petition to set aside the sale, the High Court made an order that if the judgment debtors deposited a sum of Rs 1,50,300 in Court to the credit of the Akhara before 25th July, 1945, the sale would be set aside. The order was made by the High Court on 30th April, 1945. It appears that Mahant Pooran Das resigned the Gaddi of Shanter Shah and Narendra Das was installed as Mahant in his place. In the interest of the Gaddi Mahant Narendra Das appointed a committee of trustees to advise him in the management of the affairs of the trust. The committee of trustees was appointed in pursuance of an agreement, dated 27th July, 1944. The committee consisted of eight leading Mahants of the Udasi sect and the committee was constituted to safeguard the interest of the trust and to place the management of its affairs on a satisfactory basis. After the High Court's order, dated 30th April, 1945, efforts were made by Mahant Narendra Das and the committee of trustees appointed by him to persuade the Akhara to take a smaller portion of the Dharamshala for the same amount, but their efforts were fruitless. The committee of trustees and Mahant Narendra Das had meetings on 15th April, 1945 and 30th April, 1945, to consider the matter. After the Akhara refused the offer of the committee of trustees, respondents 3 and 4 were approached by the committee and were persuaded to take a much smaller portion of the building of Dharamshala for the same amount. It was in these circumstances that respondents 1 and 2 executed the sale-deed on 14th June, 1945, in favour of respondents 3 and 4 for the portion of the Dharamshala mentioned in that document for a consideration of Rs 1,50,300.

On behalf of the appellants it was contended by Mr Purshottam Tricunddas that the mortgage deed executed on 1st June, 1933, by Mahant Saheb Das was not supported by legal necessity because the suits of 1915 and 1925 were instituted against Saheb Das challenging his right to hold the office of Mahant which was merely a personal right. It was argued that the money borrowed for meeting legal expenses of such a case was not properly chargeable to Gaddi Shanter Shah because there was no question of vindication of the rights of the Math but that the suits were contested only for vindication of private and personal rights. In support of this argument Mr Purshottam Tricunddas referred to the decision in *Sri Sharada Peeth Math Dwaraka v Sri Rajayeshwarashram*, but that decision was concerned with the question of limitation and has no bearing on the question presented for determination in the present case. It is true that there is a distinction between a suit to establish a claim to an office and a suit filed on behalf of an endowment as such to recover certain property which is claimed to belong to it, but in the present case the question is whether suit No 135 of 1915 brought by Mahant Sital Das against Mahant Saheb Das and suit No 70

of 1925 brought by Anand Prakash against Saheb Das were merely suits to establish the right of the plaintiffs to the Mahantship or whether they were suits to get the endowment property into the possession of persons who were the rightful Mahants. The very object of a Math is to maintain a competent line of religious teachers for propagating and disseminating the religious doctrines of a particular order or sect. In the eye of law there cannot be a Math without a lawfully appointed Mathadhipati as its spiritual head. For the proper functioning of a Math it is also essential that the rightful Mahant should be in control and possession of the property belonging to the Math. Where, therefore, a lawful Mathadhipati is kept out of the possession of the endowed property by a trespasser asserting a hostile claim, there is a hostile title asserted in the litigation against the Math itself. In the litigation in suit No. 135 of 1915 filed by Sital Das the expenses incurred by the Mahant must therefore be held to have been incurred in repelling a hostile attack on the trust property. Similarly, in suit No. 70 of 1925 filed by Anand Prakash against Saheb Das which was decided in favour of the latter, the expenses incurred by Mahant Saheb Das must be held to have been incurred in repelling a hostile attack on the trust property. This conclusion is also borne out by the circumstance that none of the succeeding Mahants challenged the validity of the mortgage transaction and by the other circumstance that the Akhara being the high command of the Udasi sect proceeded on the basis that the cost of the litigation was a legitimate charge on the Math properties. Reference may be made in this context to the observations of the Judicial Committee in *Murugesam Pillai v. Manickavasaka Pandara*<sup>1</sup>:

"The Board does not wish to cast any doubt upon the proposition that, in the case of mortgages granted over the security of an Adhinam or Math by the head thereof, it lies upon the mortgagee, or those in his right, to prove that the debt was a necessary expense of the institution itself. But it is a circumstance of great weight when holder after holder of the headship recognizes and deals with the debt on that basis; and as time goes on this may itself come to be a not unimportant element of probation upon the issue. It must also be fully borne in mind that with the lapse of time the parties to the transaction may die or disappear. In the present case Pillai, the lender, is dead; Manickavasaka, the borrower, is also dead; and it is conceivable that, as years elapse, in such cases nearly all the material evidence may in the course of years disappear while the debt itself still remains, having from its initiation till almost the date of suit been recognized by all concerned as a debt truly constituted by the Adhinam. In such cases a Court is much more easily satisfied that the debt was properly incurred than where the transaction was itself recent and can therefore be the subject of more exact evidence, or where the transaction, although remote, has been the subject of challenge or dispute by those charged with the interests of the institution."

We are accordingly of opinion that the mortgage deed, dated 1st June, 1933, executed by Saheb Das is supported by legal necessity. It is equally manifest that the sale-deed, dated 14th June, 1945, in favour of respondents 3 and 4 executed to satisfy the mortgage decree obtained by the Akhara is supported by legal necessity and is a valid transaction. We accordingly reject the argument of Mr. Purshottam Tricumdass on this part of the case.

There is also an alternative ground upon which the validity of the sale-deed of June 14, 1945, can be supported. It appears that on October 21, 1935, Mahant Saheb Das brought suit No. 66 of 1935 under section 33 of the U. P. Agriculturists Relief Act in the Court of First Civil Judge, Saharanpur. There was a compromise decree on March 27, 1936, by which the mortgagee—the Panchaiti Akhara was awarded a sum of Rs. 53,500 and it was agreed that this amount will be paid in 20 annual instalments of Rs. 4,000 each and the mortgaged property was to be sold in the event of default in payment of any of the instalments. There was default after payment of the first instalment by Mahant Pooran Das who succeeded to the Gaddi on the death of Saheb Das in 1936. The result was that the disputed Dharamshala was sold with the exception of the three rooms and was purchased by the Akhara Panchaiti Kalan on November 17, 1942, for Rs. 1,50,300. The Akhara Panchaiti Kalan took possession of property on 23rd November, 1945, but in the meantime Pooran Das filed an objection before the execution Court for

1. 32 M.L.J. 369; (1917) L.R. 44 I.A. 98 at 102; I.L.R. 40 Mad. 402 (P.C.).

setting aside of the sale on the ground of material irregularity under Order 21, rule 50, Civil Procedure Code. The application was dismissed on 6th February, 1943. Pooran Das filed an appeal before the High Court against the order of the Civil Judge dismissing the application. Pooran Das thereafter applied to the High Court for permission to sell a part of the building for the amount for which almost the whole of the Dharmshala had been sold in favour of the Akhara. It appears that after the resignation of Mahant Pooran Das respondent No. 1, Narendra Das succeeded him and that Narendra Das appointed a Committee of Trustees for the management of the Gaddi Shanter Shah. On 15th April, 1945, the trustees adopted a resolution that the Akhara Panchaiti Kalan should be approached to purchase a lesser portion of the Dharmshala for the amount for which it had originally purchased almost the whole of the building. There was no response from the Akhara and therefore the Committee of Trustees resolved on 30th May, 1945, to negotiate a sale with respondents 3 and 4. Ultimately respondents 3 and 4 agreed to purchase a much smaller portion of the Dharmshala for the amount Rs. 1,50,300 payable to the Akhara. On 14th June, 1945, respondents 1 and 2 executed the sale deed in favour of respondents 3 and 4 and they recited in the course of this document that the transaction was entered into in the interests of the Math because the entire building of the Dharmshala would be lost to the Math for ever if the transaction with respondents 3 and 4 was not concluded and the amount—Rs. 1,50,300, was not deposited in the High Court within the time granted. It is recited in the sale-deed that by alienating a portion of the building for Rs. 1,50,300 in favour of respondents 3 and 4 a sufficient portion of the property would be saved for the gaddi and the gaddi will be benefited. In this state of facts it is clear that the sale-deed, dated 14th June, 1945, in favour of respondents 3 and 4 was supported by legal necessity, for otherwise the portion of the Dharmshala which was saved by means of the sale-deed would have been lost irrevocably to the trust.

In *Prosunno Kumari Debya v. Golab Chand Baboo*<sup>1</sup> it was observed by the Judicial Committee that notwithstanding that property devoted to religious purposes is, as a rule, inalienable, it is competent for a sheth to incur debts and borrow money for the service of the idol and preservation of its property, to the extent to which there is an existing necessity for so doing, his power in that respect being analogous to that possessed by the manager for an infant heir. In *Hunooman Pershad Panday v. Mussumat Babooee Munraj Koonweree*<sup>2</sup> Lord Justice Knight Bruce observed:

"The power of the manager for an infant heir to charge an estate not his own is, under the Hindu law, a limited and qualified power. It can only be exercised rightly in a case of need or for the benefit of the estate. But where in the particular instance the charge is one that a prudent owner would make in order to benefit the estate the *bona fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded. But, of course, if that danger arises or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favour against the heir grounded on a necessity which his own wrong has helped to cause. Therefore the lender in this case, unless it is shown to have acted *malafide*, will not be affected though it be shown that with better management the estate might have been kept free from debt."

In *Naladri Sahu v. Mahant Chaturbhuj Das*<sup>3</sup> the Mahant of a Math mortgaged certain of the endowed properties at 1 per cent per mensem in order to discharge loans at 2 per cent per mensem which were an accumulating burden upon the endowment, he also covenanted personally to pay. The original loans had been incurred mainly for the purpose of constructing pakka buildings for the accommodation of wealthy devotees visiting the Math, and in part for the ordinary expenses of the worship. In a suit to enforce the mortgage against the Mahant personally and against the mortgaged property, in which suit the Mahant failed either to give evidence or to produce the books of the Math it was held by the

<sup>1</sup> (1875) L.R. 2 I.A. 145

<sup>2</sup> (1847-57) 6 Moore's I.A. Case 243

<sup>3</sup> 51 M.L.J. 872 (1976) L.R. 53 I.A. 233  
A.I.R. 1926 P.C. 112

Judicial Committee that the mortgage was for necessity so as to be within the power of the Mahant, even if the original loans had been incurred recklessly and not for the benefit of the Math, which however was not shown to have been the case. At page 267 Lord Atkinson states:

"Even if the building scheme of the defendant had been reckless, inconsistent, unsound and liable to fail, which has not been proved, what drove him to borrow this money Rs. 25,000 on mortgage, to pay old debts, and so be relieved of the oppressive burden which the exorbitant rate of interest at which these earlier loans were made imposed upon him? It was the high rate of interest, which he was already bound to pay, that was the necessary and immediate cause of his giving this mortgage, though the remote cause of it was the getting into debt by the building operation. In their Lordships' view the principle of the case above-mentioned applies to this case."

In testing therefore, the question of legal necessity for the impugned transaction regard must be paid to the actual pressure on the estate, the immediate danger to be averted or the benefit to be conferred upon the trust estate. Applying the test in the present case, we are satisfied that the transaction of sale, dated 14th June, 1945, in favour of respondents 3 and 4 was beneficial to the gaddi of Shanter Shah and the finding of the lower Courts on this point is correct.

On behalf of the respondents Nos. 3 and 4 Mr. Viswanatha Sastri contended that the decision of the High Court on the issue of *res judicata* was not correct. We are, however, satisfied that the High Court was right in taking the view for the reasons given by it that the decision in suit No. 3 of 1943 did not operate as *res judicata*.

For these reasons we hold there is no merit in this appeal which is accordingly dismissed with costs.

K.G.S.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, C.J., K. N. WANCHOO, M. HIDAYA-TULLAH, J. C. SHAH AND S. M. SIKRI, JJ.

Union of India

*.. Appellant\**

v.

Sukumar Pyne

*.. Respondent.*

*Foreign Exchange Regulation Act (VII of 1947) as amended by Act (XXXIX of 1957), sections 23 (1) (a) and 23-D—Contravention of section 23 (1) committed before the amendment Act (XXXIX of 1957) came into force—Adjudication proceedings under the amended provisions—Legality—Amended section 23 (1) (a) if contravenes Article 20 (1) of the Constitution of India (1950).*

Adjudication proceedings under the new section 23 (1) (a) read with section 23-D of the Foreign Exchange Regulation Act (VII of 1947) introduced by the amending Act XXXIX of 1957, in respect of an offence committed before the amending Act XXXIX of 1957 came into force, would not be without jurisdiction. The amendment only changed the venue of trial from a Magistrate to the Director of Enforcement in some cases and no vested right was affected. A person accused of the commission of an offence has no vested right to be tried by a particular Court or a particular procedure except in so far as there is any constitutional objection by way of discrimination or the violation of any other fundamental right is involved. It is well recognised that no person has a vested right in any course of procedure. There is no principle underlying Article 20 of the Constitution of India which makes a right to any course of procedure a vested right.

The contention that the new section 23 (1) (a) introduced by Act XXXIX of 1957 contravenes Article 20 (1) of the Constitution of India, inasmuch as the new section prescribes a minimum penalty while under the old section no such minimum was prescribed, is untenable. The new



section does not prescribe any minimum. What it does prescribe is a maximum. The words "not exceeding", in section 23 (1) (a), cover not only the expression "three times the value of the foreign exchange" but also the words "five thousand rupees". Therefore, no greater penalty than might have been levied under the old section has been prescribed by the new section 23 (1) (a), and consequently there is no breach of Article 20 (1) of the Constitution of India.

Appeal from the Judgment and Order dated the 10th August, 1961, of the Calcutta High Court in Civil Rule No 1428 of 1958

*S V Gupte*, Solicitor-General of India, (*R Ganapathy Iyer* and *R H Dhebar*, Advocates, with him), for Appellant

*G S Chatterjee* and *P K Chatterjee*, Advocates, for Respondent

The Judgment of the Court was delivered by

*Sikri, J.*—This is an appeal by certificate granted by the High Court of Calcutta under Article 132 (1) of the Constitution and is directed against the judgment of the High Court accepting a petition under Article 226 of the Constitution and quashing adjudication proceedings under the Foreign Exchange Regulation Act, 1947 (VII of 1947)—hereinafter referred to as the Act

The relevant facts are as follows. Following the recovery in 1954 of some foreign currency and Travellers Cheques at No 311, Bow Bazar Street, Calcutta, where the respondent along with his mother and brother, carried on the business of jewellers, the Director of Enforcement issued a notice on April 23, 1958, on the petitioner calling upon him to show cause within 10 days of the receipt of the notice why adjudication proceedings should not be held against him for contravention of section 23 (1) of the Act. On 10th May, 1958, the respondent replied to the above memorandum giving his version as to how he came into possession of the foreign currency, but he denied having sold any travellers cheques. He prayed that the proceedings may be dropped and the currency seized returned to him. The Director of Enforcement, after considering the cause shown by the respondent, came to the conclusion that the adjudication proceedings should be held. He, therefore, requested the respondent to arrange to be present either personally or through his authorized representative before the Director on 13th May, 1958, in the office of the Calcutta Branch of the Directorate. On this, on 13th May, 1959, the respondent filed a petition under Article 226 of the Constitution challenging the adjudication proceedings on various grounds, the principal grounds being that section 23 (1) (a) and section 23-D of the Act were *ultra vires* of Article 20 (2) of the Constitution, and that the offence having been committed in 1954, the proposed adjudication was illegal and entirely without jurisdiction.

Before the High Court, at the time of the final hearing, the petitioner was allowed to raise the point that section 23 (1) (a) as well as section 23-D contravened Article 14 of the Constitution.

*Mitter, J.*, held that section 23 (1) (a) violated Article 14 of the Constitution, and was accordingly *ultra vires* the Constitution, and that the relative provision of section 23-D must also be condemned. Regarding the second point namely, whether section 23 (1) (a) having been substituted by the Amending Act XXXIX of 1957, would have retrospective operation in respect of the alleged offence, which took place in 1954, the High Court came to the conclusion that the petitioner "had a vested right to be tried by an ordinary Court of the land with such rights of appeal as were open to all", and although section 23 (1) (a) was procedural, where a vested right was affected, *prima facie*, it was not a question of procedure. Therefore, the High Court came to the conclusion that the provision as to adjudication by the Director of Enforcement could not have any retrospective operation. The learned Judge observed that "the impairment of a right by putting a new restriction thereupon is not a matter of procedure only." 11

impairs a substantive right and an enactment which does so is not retrospective unless it says so expressly or by necessary intendment." Accordingly, as stated before, the adjudication proceedings were quashed as being without jurisdiction.

This Court held in *Shanti Prasad Jain v. Director of Enforcement*<sup>1</sup> that section 23 (1) and section 23-D of the Foreign Exchange Regulation Act did not violate Article 14 of the Constitution. Mr. P. K. Chatterjee, Counsel for the respondent, properly concedes that he cannot press this point.

The learned Solicitor-General, who appeared on behalf of the appellant, contends that the High Court was in error in holding that the accused had a vested right to be tried by an ordinary criminal Court. He says that the amendment only changed the venue of trial from a Magistrate to the Director of Enforcement in some cases and no vested right was affected. He refers to the decision of this Court in *Rao Shiv Bahadur Singh v. The State of Vindhya Pradesh*<sup>2</sup> where Jagannadhadass, J., speaking for the Court, observed at p. 1200 as follows:

"In this context it is necessary to notice that what is prohibited under Article 20 is only conviction or sentence under an *ex post facto* law and not the trial thereof. Such trial under a procedure different from what obtained at the time of the commission of the offence or by a Court different from that which had competence at the time cannot *ipso facto* be held to be unconstitutional. A person accused of the commission of an offence has no fundamental right to trial by a particular Court or by a particular procedure, except in so far as any constitutional objection by way of discrimination or the violation of any other fundamental right may be involved."

Before its amendment by Act XXXIX of 1957, section 23 (1) of the Act read as follows:

"23 (1)—Whoever contravenes any of the provisions of this Act or of any rule, direction or order made thereunder shall be punishable with imprisonment for a term which may extend to two years or with fine or with both, and any Court trying any such contravention may, if it thinks fit and in addition to any sentence which it may impose for such contravention, direct that any currency, security, gold or silver, or goods or other property in respect of which the contravention has taken place shall be confiscated....."

After the amendment by Act XXXIX of 1957, another section 23 (1) was substituted and section 23-D was added, which read as follows:

"23 (1)—If any person contravenes the provisions of section 4, section 5, section 9, section 10, sub-section (2) of section 12, section 17, section 18-A or section 18-B or of any rule, direction or order made thereunder, he shall—

(a) be liable to such penalty not exceeding three times the value of the foreign exchange in respect of which the contravention has taken place, or five thousand rupees, whichever is more, as may be adjudged by the Director of Enforcement in the manner hereinafter provided, or....."

23-D (1).—For the purpose of adjudging under clause (a) of sub-section (1) of section 23 whether any person has committed a contravention the Director of Enforcement shall hold an inquiry in the prescribed manner after giving that person a reasonable opportunity of being heard and if, on such inquiry, he is satisfied that the person has committed the contravention, he may impose such penalty as he thinks fit in accordance with the provision of the said section 23 :

Provided that if, at any stage of the inquiry, the Director of Enforcement is of opinion that having regard to the circumstances of the case, the penalty which he is empowered to impose would not be adequate, he shall, instead of imposing any penalty himself, make a complaint in writing to the Court....."

The effect of these provisions is that after the amendment of 1957, adjudication proceedings or criminal proceedings could be taken up in respect of a contravention mentioned in section 23 (1) while before the amendment only criminal proceedings before a Court could be instituted to punish the offender. The High Court, as already observed, held that the new amendment did not apply to contraventions which took place before the Act came into force.

Mr. Chatterjee, the learned Counsel for the respondent, urges that a substantive vested right to be tried by an ordinary Court existed before the

1. (1963) 2 S.G.R. 297.  
S.C.J.—30

2. (1953) S.C.J. 563: (1953) S.G.R. 1188.

amendment, and he relied on Maxwell 11th Edition, p 217, where it is stated that

"the general principle however, seems to be that alterations in procedure are retrospective, unless there be some good reason against it"

He says that there is a good reason if the principles of Article 20 are borne in mind. In our opinion there is force in the contention of the learned Solicitor-General. As observed by this Court in *Rao Shri Bahadur Singh v The State of Vindhya Pradesh*<sup>1</sup> a person accused of the commission of an offence has no vested right to be tried by a particular Court or a particular procedure except in so far as there is any constitutional objection by way of discrimination or the violation of any other fundamental right is involved. It is well recognized that "no person has a vested right in any course of procedure" (*vide* Maxwell 11th Edition p 216), and we see no reason why this ordinary rule should not prevail in the present case. There is no principle underlying Article 20 of the Constitution which makes a right to any course of procedure a vested right. Mr Chatterjee complains that there is no indication in the amending Act that the new procedure would be retrospective and he further says that this affects his right of appeal under the Criminal Procedure Code. But if this is a matter of procedure, then it is not necessary that there should be a special provision to indicate that the new procedural law is retrospective. No right of appeal under the Criminal Procedure Code is affected because no proceedings had ever been started under the Criminal Procedure Code.

Mr Chatterjee's next point is that the new section 23 (1) (a) contravenes Article 20 (1) of the Constitution. He says that section 23 (1) (a) prescribes a minimum penalty while under the old section 23 (1) the Magistrate had an option of fixing a fine less than the minimum prescribed under section 23 (1) (a). But we are unable to agree with him that the new section prescribes any minimum. What it does prescribe is a maximum. The words "not exceeding" cover not only the expression "three times the value of the foreign exchange" but also the words "five thousand rupees". Therefore, no greater penalty than might have been levied under the old section has been prescribed by the new section 23 (1) (a) and consequently there is no breach of Article 20 (1) of the Constitution.

We may add that the offence is alleged to have been committed in 1954 and notice of adjudication was sent in 1958 and now we are in the year 1955. It would be expedient if the adjudication proceedings are disposed of as expeditiously as possible.

In the result the appeal is accepted and the petition under Article 226 dismissed. The appellant will have his costs here and in the High Court.

V K

*Appeal allowed.*

THE SUPREME COURT OF INDIA.  
(Civil Appellate Jurisdiction.)

PRESENT:—A. K. SARKAR, K. N. WANCHOO and J. R. MUDHOLKAR, JJ.

The State of Madhya Pradesh and others

.. Appellants\*

v.

Vishnu Prasad Sharma and others

.. Respondents.

U. P. State Industrial Corporation

.. Intervener.

*Land Acquisition Act (I of 1894), sections 4, 5 and 6—Number of declarations under section 6—If can be issued successively in respect of different pieces of lands within the locality specified in a notification under section 4 of the Act.*

Sections 4, 5-A and 6 of the Land Acquisition Act have to be read together and so read the conclusion is clear that the Act contemplates only a single declaration under section 6 in respect of a notification under section 4. The provision for withdrawal (section 48) and the special provision for acquiring the whole where only part is mentioned in notice under section 6, (section 49) do not affect the interpretation of sections 4, 5-A and 6 read together.

A number of declarations under section 6 cannot be issued successively in respect of different pieces of lands include within the locality specified in a notification issued under section 4 of the Act.

There is no power under the Act to issue successive declarations under section 6.

Appeal from the Judgment and Order, dated the 21st February, 1962, of the Madhya Pradesh High Court in Miscellaneous Petition No. 275 of 1961.

C. K. Daptary, Attorney-General for India, M. Adhikari, Advocate-General for State of Madhya Pradesh (H. L. Khaskalam, Government Advocate for Madhya Pradesh, I. N. Shroff, Advocate, with them) for Appellants.

S. V. Gupta, Solicitor-General of India (J. B. Dadachanji, Advocate of Messrs. J. B. Dadachanji & Co. with him), for Respondents.

S. N. Kacker, Senior Advocate, (J. P. Goyal, Advocate, with him) for Intervener.

The following Judgments were delivered:

*Sarkar, J.*—My learned brother Wanchoo has set out the facts fully in his judgment and that relieves me of the necessity of stating them again.

The question that has arisen is whether a number of declarations under section 6 of the Land Acquisition Act, 1894, can be issued successively in respect of different pieces of lands included within the locality specified in a notification issued under section 4 of the Act. My learned brother has said that sections 4, 5-A and 6 of the Act have to be read together and so read, the conclusion is clear that the Act contemplates only a single declaration under section 6 in respect of a notification under section 4. I so entirely agree with his reasonings for this view that I find it unnecessary to add anything to them. But it was said that there are other considerations which indicate that our reading of these sections is unsound. In this judgment I propose to deal only with these considerations.

It was said that the Government may have difficulty in making the plan of its project complete at a time, particularly where the project is large and, therefore, it is necessary that it should have power to make a number of declarations under section 6. I am wholly unable to accept this argument. First, I do not think that a supposed difficulty would provide any justification for accepting an interpretation of a statute against the ordinary meaning of the language used in it. General considerations of the kind suggested cannot authorise a departure from the plain meaning of words. Secondly, I cannot imagine a Government,

9th February, 1966.

\*C.A. No. 1018 of 1963.

which has vast resources, not being able to make a complete plan of its project at a time. Indeed, I think when a plan is made, it is a complete plan. I should suppose that before the Government starts acquisition proceedings by the issue of a notification under section 4, it has made its plan for otherwise it cannot state in the notification, as it has to do, that the land is likely to be needed. Even if it had not then completed its plan, it would have enough time before the making of declaration under section 6 to do so. I think, therefore, that the difficulty of the Government, even if there is one, does not lead to the conclusion that the Act contemplates the making of a number of declarations under section 6. I would like to observe here to avoid confusion that we are not concerned now with extension of a completely planned project conceived later. The present contention is not based on any difficulty arising out of such a case. It was said that if the Government has not finalised its plan when it makes a declaration under section 6, it would have to start fresh acquisition proceedings beginning with a notification under section 4 to provide for the complete plan if it could not make any more declarations and in such a case, in conceivable circumstances, it may have to pay more for the land that it then sought to acquire. This argument concedes that even if the Government has not been able to make its plan when making a declaration under section 6, the result is not that it cannot acquire any more land later when the plan is completed. The real point, therefore, of the present argument is that the Act should be so interpreted that the Government should not be put to extra cost when it has been unable to complete its plan at a time. This seems to me to be a strange argument. First, there is no reason why the Act should provide for the Government's failure to complete the plan. Secondly, the argument is hypothetical for one does not know for sure whether a later acquisition will cost more or less. Arguments on hypothetical considerations can have little weight in interpreting statutes. But even otherwise, this view of the matter does not support the argument. After the issue of a notification under section 4, an owner of land in the locality notified cannot have full beneficial enjoyment of his property, he cannot, for example, build on his land for if he does so and the land is acquired, he will get no compensation for the building put up and will lose the costs incurred for it. If it is a justification for saying that a number of declarations can be made under section 6 because otherwise the Government may have to pay more, it seems to me that it is at least an equal justification for saying that such declarations cannot have been contemplated by the Act because that would mean an avoidable deprivation of the owners of their beneficial enjoyment of lands till such time as the Government is able to make its plan. As the Act is an expropriatory Act, that interpretation of it should be accepted which puts the least burden on the expropriated owner. The Government could, of course, always make a complete plan at a time and I am unable to hold that the Act contemplated that it need not do so and go on making declarations from time to time as its plan goes on taking shape even though the result might be to increase the hardship of persons whose lands are taken away.

Reference was then made to sub-sections (1) and (4) of section 17. These give the Government the power to take possession of waste and arable lands included in the notification under section 4 on the expiry of fifteen days from the publication of the notice mentioned in section 9 and before the making of the award without holding the enquiry contemplated by section 5. It was said that if a notification under section 4 included both arable and waste lands as also lands of other descriptions, it will be necessary to issue two separate declarations under section 6 in respect of the different kinds of lands. It was also said that the vesting in respect of the two kinds of lands in the Government would also be by stages. All this, it was contended, would support the view that more than one declaration under section 6 was contemplated in such a case. I do not feel called upon to express any opinion whether in such a case a number of declarations under section 6 is contemplated. It is enough to say that it is not contended that

this is a case of that kind. Therefore, it cannot be said that the disputed declaration under section 6 was in this case justified under section 17. On the contrary, if the contention that section 17 contemplates more declarations than one under section 6 be correct, that would be because the statute specifically so provided for a particular case. It must follow that without a special provision more than one declaration under section 6 was not contemplated.

The next contention was that section 48 which gives the Government power of withdrawal from acquisition before taking possession implies that a notification under section 4 remains in force for all purpose till such withdrawal, and if it so remains in force, successive declarations under section 6 must be permissible for otherwise it would be useless to keep the notification under section 4 in force. The substance of this argument is that the only way to get rid of a notification under section 4 is by a withdrawal of the acquisition proceedings under section 48; if the proceedings are not withdrawn, the notification remains and then there may be successive declarations. This argument seems to me clearly ill founded. Now a notification under section 4 will be exhausted if a declaration is made under it in respect of the entire area covered by it. Likewise, it seems to me that if the correct interpretation is that only one declaration can be made under section 6, that also would exhaust the notification under section 4; that notification would no longer remain in force to justify successive declarations under section 6 in respect of different areas included in it. There is nothing in the Act to support the view that it is only a withdrawal under section 48 that puts a notification under section 4 completely out of the way. The effect of section 48 is to withdraw the acquisition proceedings, including the notification under section 4 with which it started. We are concerned not with a withdrawal but with the force of a notification under section 4 having become exhausted. That is a different case and has nothing to do with a withdrawal.

Lastly, we were referred to sub-sections (2) and (3) of section 49. These sub-sections state that where a claim for compensation is made on the ground of severance of the land acquired from the remaining land of the owner for which provision is made under section 23, if the Government thinks that the claim is unreasonable it may before the making of the award order the acquisition of the whole land and in such a case no fresh declaration under section 6 will be necessary. It is contended that these provisions support the view that successive declarations under section 6 were contemplated. I do not think they do so. In any case, even if they did, then that would be because in a particular case the statute specially provided for successive declarations under section 6. The present is not that special case. Furthermore, as I have said in connection with the argument based on section 17, the fact that a special provision was necessary to enable successive declarations under section 6 to be made would go to support the view that without a special provision there is no power given by the Act to issue successive declarations under section 6.

I would for these reasons dismiss the appeal with costs.

*Wanchoo, J.* (for himself and *Mudholkar, J.*).—The only question raised in this appeal on a certificate granted by the Madhya Pradesh High Court is whether it is open to the appropriate Government to issue successive notifications under section 6 of the Land Acquisition Act (I of 1894) (hereinafter referred to as the Act) with respect to land comprised within one notification under section 4 (1) of the Act. The question arises in this way.

On 16th May, 1949, a notification was issued under section 4 (1) of the Act by which it was declared that lands in eleven villages including village Chhawani was likely to be needed for a public purpose, i.e., the erection of an iron and steel plant. It appears that thereafter notifications were issued under section 6 with respect to the villages notified in the notification under section 4 (1) and it is not in dispute that a number of such notifications under section 6 were issued.

with respect to village Chhawani and some land in that village was acquired under those notifications, the last of such acquisitions being in the year 1956. Thereafter on 12th August, 1960, another notification under section 6 of the Act was issued by the appropriate Government proposing to acquire 486.17 acres of land in village Chhawani and the area which was proposed to be acquired was demarcated on a map kept in the office of the Collector of Durg for inspection. The notification also stated that the provisions of section 5-A of the Act shall not apply thereto. Thereupon the respondents who are interested in some of the land notified filed a writ petition in the High Court challenging the validity of the notification under section 6. The principal contention raised on their behalf was that the notification under section 6 of the Act was void as it had not been preceded by a fresh notification under section 4 (1) and the notification under section 4 (1) issued in 1949 had exhausted itself when notifications under section 6 with respect to this village had been issued previously and could not support the issue of another notification under section 6. In substance the contention of the respondents in their petition was that a notification under section 4 (1) could be followed only by one notification under section 6 and that there could be no successive notifications under section 6 with respect to lands comprised in one notification under section 4 (1).

The petition was opposed on behalf of the appellant, and it was contended that it was open to the appropriate Government to issue as many notifications as it deemed fit under section 6 of the Act with respect to lands comprised in one notification under section 4 (1) and that it was not correct that the notification under section 4 (1) was exhausted as soon as one notification under section 6 was issued with respect to a part of the land comprised in the notification under section 4 (1), and that it was always open to the appropriate government to issue successive notifications under section 6 so long as these notifications were with respect to land comprised within the notification under section 4 (1).

The High Court has accepted the contention of the respondents and has held that a notification under section 4 (1) can only be followed by one notification under section 6 and that it is not open to the appropriate Government to issue successive notifications with respect to parts of the land comprised in one notification under section 4 and that as soon as one notification is issued under section 6 whether it be with respect to part of the land comprised in the notification under section 4 (1) or with respect to the whole of it, the notification under section 4 (1) is exhausted and cannot support any further notification under section 6 of the Act with respect to parts of land comprised in the notification under section 6. In consequence the petition was allowed and the notification, dated 12th August, 1960, quashed. The appellant then applied to the High Court for a certificate which was granted, and that is how the matter has come up before us.

The question whether only one notification under section 6 can be issued with respect to land comprised in the notification under section 4 (1) and thereafter the notification under section 4 (1) exhausts itself and cannot support any further notification under section 6 with respect to such land depends upon the construction of sections 4, 5-A and 6 of the Act and on the connection between these provisions. Before however we deal with these provisions we may briefly refer to the scheme of the Act and the background in which these provisions have to be interpreted.

The Act provides for the exercise of the power of *eminent domain* and authorises the appropriate Government to acquire lands thereunder for public purpose or for purposes of a company. The proceedings begin with a notification under section 4 (1). After such a notification it is permissible under section 4 (2) for any officer of Government, his servants and workmen to enter upon and survey the land in such locality, to dig or bore into the sub-soil, to do all other acts necessary to ascertain

whether the land is adapted for the purpose for which it was needed, to set out the boundaries of the land proposed to be taken and the intended line of the work proposed to be made thereon. to mark boundaries etc. by placing marks and fences and where otherwise the survey cannot be completed to cut down and clear away any part of any standing crop, fence or jungle. While the survey is being done under section 4 (2), it is open to any person interested in the land notified under section 4 (1) to object under section 5-A before the Collector within thirty days after the issue of the notification to the acquisition of the land or of any land in the locality. The Collector is authorised to hear the objections and is required after hearing all such objections and after making such further enquiry as he thinks necessary to submit the case for the decision of the appropriate Government together with the record of the proceedings held by him and a report containing his recommendations on the objections. Thereafter the appropriate Government decides the objections and such decision is final. If the appropriate Government is satisfied after considering the report that any particular land is needed for a public purpose or for a company it has to make a declaration to that effect. After such a declaration has been made under section 6, the appropriate Government directs the Collector under section 7 to take order for the acquisition of the land. Sections 8 to 15 provide for the proceedings before the Collector. Section 16 authorises the Collector to take possession after he has made the award under section 11 and thereupon the land vests absolutely in the Government free from all encumbrances. Section 17 provides for special powers in cases of urgency. If a person is not satisfied with the award of the Collector, sections 18 to 28 provide for proceedings on a reference to Court. Sections 31 to 34 provide for payment of compensation. Sections 38 to 44 make special provisions for acquisition of land for companies. Section 48 gives power to Government to withdraw from the acquisition of any land of which possession has not been taken. Section 49 provides for special powers with respect to acquisition of house, building or manufactory and of land severed from other land.

It will be seen from this brief review of the provisions with respect to acquisition of land that sections 4 and 6 are the basis of all the proceedings which follow and without the notifications required under sections 4 and 6 no acquisition can take place. The importance of a notification under section 4 is that on the issue of such notification the land in the locality to which the notification applies is in a sense frozen. This freezing takes place in two ways. Firstly, the market value of the land to be acquired has to be determined on the date of the notification under section 4 (1): [see section 23 (1), firstly]. Secondly, any outlay or improvements on or disposal of the land acquired commenced, made or effected without the sanction of the Collector after the date of the publication of the notification under section 4 (1) cannot be taken into consideration at all in determining compensation: (see section 24, severally).

It is in this background that we have to consider the question raised before us. Two things are plain when we come to consider the construction of sections 4, 5-A and 6. The first is that the Act provides for acquisition of land of persons without their consent. though compensation is paid for such acquisition; the fact however remains that land is acquired without the consent of the owner thereof and that is a circumstance which must be borne in mind when we come to consider the question raised before us. In such a case the provisions of the statute must be strictly constructed as it deprives a person of his land without his consent. Secondly, in interpreting these provisions the Court must keep in view on the one hand the public interest which compels such acquisition and on the other the interest of the person who is being deprived of his land without his consent. It is not in dispute that it is open to the appropriate Government to issue as many notifications as it deems fit under section 4 (1) even with respect to the same locality followed by a proper notification under section 6 so that the power of the appropriate Government to acquire land in any locality is not exhausted by



the issue of one notification under section 4 (1) with respect to that locality. On the other hand as the compensation has to be determined with reference to the date of the notification under section 4 (1) the person whose land is to be acquired may stand to lose if there is a great delay between the notification under section 4 (1) and the notification under section 6 in case prices have risen in the meantime. This delay is likely to be greater if successive notifications under section 6 can be issued with respect to land comprised in the notification under section 4 with greater consequential loss to the person whose land is being acquired if prices have risen in the meantime. It is however urged that prices may fall and in that case the person whose land is being acquired will stand to gain. But as it is open to the appropriate Government to issue another notification under section 4 with respect to the same locality after one such notification is exhausted by the issue of a notification under section 6, it may proceed to do so where it feels that prices have fallen and more land in that locality is needed and thus take advantage of the fall in prices in the matter of acquisition. So it is clear that there is likely to be prejudice to the owner of the land if the interpretation urged on behalf of the appellant is accepted while there will be no prejudice to the Government if it is rejected for it can always issue a fresh notification under section 4 (1) after the previous one is exhausted in case prices have fallen. It is in this background that we have to consider the question raised before us.

As we have said already, the process of acquisition always begins with a notification under section 4 (1). That provision authorises the appropriate Government to notify that land in any locality is needed or is likely to be needed for any public purpose. It will be noticed that in this notification the land needed is not particularised but only the locality where the land is situate is mentioned. As was observed by this Court in *Babu Barkya Thakur v The State of Bombay*<sup>1</sup> a notification under section 4 of the Act envisages a preliminary investigation and it is only under section 6 that the Government makes a firm declaration. The purpose of the notification under section 4 (1) clearly is to enable the Government to take action under section 4 (2) in the matter of survey of land to decide what particular land in the locality specified in the notification under section 4 (1) it will decide to acquire. Another purpose of the notification under section 4 (1) is to give opportunity to persons owning land in that locality to make objections under section 5-A. These objections are considered by the Collector and after considering all objections he makes a report containing his recommendation on the objections to the appropriate Government whose decision on the objections is final. Section 5-A obviously contemplates consideration of all objections made to the notification under section 4 (1) and on report thereafter by the Collector to the Government with respect to those objections. The Government then finally decides those objections and thereafter proceeds to make a declaration under section 6. There is nothing in section 5-A to suggest that the Collector can make a number of reports dealing with the objections piecemeal. On the other hand section 5-A specifically provides that the Collector shall hear all objections made before him and then make a report, i.e., only a single report to the Government containing his recommendation on the objections. It seems to us clear that when such a report is received from the Collector by the Government it must give a decision on all the objections at one stage and decide once for all what particular land out of the locality notified under section 4 (1) it wishes to acquire. It has to be satisfied under section 6 after considering the report made under section 5-A that a particular land is needed for a public purpose or for a company and it then makes a declaration to that effect under section 6. Reading sections 4, 5-A and 6 together it seems to us clear that the notification under section 4 (1) specifies merely the locality in which the land is to be acquired and then under section 4 (2) survey is made and it is considered whether the land or part of it is adapted to the purpose for which it is required and maps are prepared of the land proposed to be taken

Then after objections under section 5-A have been disposed of the Government has to decide what particular land out of the locality specified in the notification under section 4 (1) it will acquire. It then makes a declaration under section 6 specifying the particular land that is needed.

Sections 4, 5-A and 6 in our opinion are integrally connected. Section 4 specifies the locality in which the land is acquired and provides for survey to decide what particular land out of the locality would be needed. Section 5-A provides for hearing of objections to the acquisition and after these objections are decided the Government has to make up its mind and declare what particular land out of the locality it will acquire. When it has so made up its mind it makes a declaration as to the particular land out of the locality notified in section 4 (1) which it will acquire. It is clear from this intimate connection between sections 4, 5-A and 6 that as soon as the Government has made up its mind what particular land out of the locality it requires, it has to issue a declaration under section 6 to that effect. The purpose of the notification under section 4 (1) is at this stage over and it may be said that it is exhausted after the notification under section 6. If the Government requires more land in that locality besides that notified under section 6, there is nothing to prevent it from issuing another notification under section 4 (1) making a further survey if necessary, hearing objections and then making another declaration under section 6. The notification under section 4 (1) thus informs the public that land is required or would be required in a particular locality and thereafter the members of the public owning land in that locality have to make objections under section 5-A; the Government then makes up its mind as to what particular land in that locality is required and makes a declaration under section 6. It seems to us clear that once a declaration under section 6 is made, the notification under section 4 (1) must be exhausted, for it has served its purpose. There is nothing in sections 4, 5-A and 6 to suggest that section 4 (1) is a kind of reservoir from which the Government may from time to time draw out land and make declarations with respect to it successively. If that was the intention behind sections 4, 5-A and 6 we would have found some indication of it in the language used therein. But as we read these three sections together we can only find that the scheme is that section 4 specifies the locality, then there may be survey and drawing of maps of the land and the consideration whether the land is adapted for the purpose for which it has to be acquired, followed by objections and making up of its mind by the Government what particular land out of that locality it needs. This is followed by a declaration under section 6 specifying the particular land needed and that in our opinion completes the process and the notification under section 4 (1) cannot be further used thereafter. At the stage of section 4 the land is not particularised but only the locality is mentioned; at the stage of section 6 the land in the locality is particularised and thereafter it seems to us that the notification under section 4 (1) having served its purpose exhausts itself. The sequence of events from a notification of the intention to acquire section 4 (1) to the declaration under section 6 unmistakably leads one to the reasonable conclusion that when once a declaration under section 6 particularising the area out of the area in the locality specified in the notification under section 4 (1) is issued, the remaining non-particularised area stands automatically released. In effect the scheme of these three sections is that there should be first a notification under section 4 (1) followed by one notification under section 6 after the Government has made up its mind which land out of the locality it requires.

It is urged however that where the land is required for a small project and the area is not large the Government may be able to make up its mind once for all what land it needs, but where as in the present case land is required for a large project requiring a large area of land Government may not be able to make up its mind all at once. Even if it be so there is nothing to prevent the Government from issuing another notification under section 4 followed by a notification

under section 6. As we have said before, the Government's power to acquire land in a particular locality is not exhausted by issuing one notification under section 4 (1) followed by a notification under section 6. The interpretation which has commended itself to us therefore does not deprive the Government of the power to acquire more land from the same locality if later on it thinks that more land than what has been declared under section 6 is needed. It can proceed to do so by a fresh notification under section 4 (1) and a fresh declaration under section 6. Such a procedure would in our opinion be fair to all concerned, it will be fair to Government where the prices have fallen and it will be fair to those whose land is being acquired where the prices have risen. Therefore as we read these three sections we are of opinion that they are integrally and intimately connected and the intention of the Legislature was that one notification under section 4 (1) should be followed by survey under section 4 (2) and objections under section 5-A and thereafter one declaration under section 6. There is nothing in sections 4, 5-A and 6 which supports the construction urged on behalf of the appellant and in any case it seems to us that the construction which commends itself to us and which has been accepted by the High Court is a fair construction keeping in view the background to which we have referred. Even if two constructions were possible which we think is not so, we would be inclined to the construction which has commended itself to us because that construction does not restrict the power of the Government to acquire land at any time it deems fit to do and at the same time works fairly to wards persons whose land is to be acquired compulsorily.

It now remains to consider certain other provisions of the Act to which reference has been made on behalf of the appellant to show that successive notifications under section 6 are contemplated with respect to land in a locality specified in the notification under section 4 (1). The first provision is contained in section 17 (4). Section 17 (1) gives power to Government in cases of urgency to direct that the Collector should take possession of the land before the award is made and such possession can be taken on expiration of fifteen days from the publication of the notice under section 9 (1). Further such possession can only be taken of waste or arable land and on such possession being taken such land vests absolutely to the Government free from all encumbrances. To carry out the purposes of section 17 (1), section 17 (4) provides that the appropriate Government may direct that the provisions of section 5-A shall not apply in cases of urgency and if it so directs, a declaration under section 6 may be made in respect of the land at any time after the publication of the notification under section 4 (1). It is urged that this shows that where the land notified under section 4 (1) includes land of the kind mentioned in section 17 (1) and also land which is not of that kind it would be open to Government to make a declaration under section 6 with respect to the land mentioned in section 17 (1) immediately after the notification under section 4 (1) while notification with respect to the land which is not of the kind mentioned in section 17 (1) can follow later after the enquiry under section 5-A is over and objections have been disposed of. So it is urged that more than one declaration is contemplated under section 6 after one notification under section 4 (1). There are two answers to this argument. In the first place where the land to be acquired is of the kind mentioned in section 17 (1) and also of the kind not included in section 17 (1) there is nothing to prevent the Government from issuing two notifications under section 4 (1) one relating to land which comes within section 17 (1) and the other relating to land which cannot come within section 17 (1). Thereafter the Government may issue a notification under section 6 following the notification under section 4 (1) with respect to the land to which section 17 (1) applies while another notification under section 6 with respect to land to which section 17 (1) does not apply can follow after the enquiry under section 5-A. So section 17 (4) does not necessarily mean that there can be two notifications under section 6 where the provisions of that section

are to be utilised for the Government can from the beginning issue two notifications under section 4 and follow them up by two declarations under section 6. But even assuming that it is possible to make two declarations under section 6 (though in view of what we have said above this is not necessary and we express no final opinion about it) where the land to be acquired is both of the kind mentioned in section 17 (1) and also of the kind not comprised therein, all that the Government can do in those circumstances after one notification under section 4 (1) comprising both lands is to issue one notification under section 6 comprising lands coming within section 17 (1) and another notification under section 6 with respect to land not coming within section 17 (1) sometime later after the enquiry under section 5-A is finished. This however follows from the special provisions contained in section 17 (1) and (4) and in a sense negatives the contention of the appellant based only on sections 4, 5-A and 6. It may be added that that is not the position in the present case. Therefore even if it were possible to issue two notifications under section 6 in the special circumstances arising out of the application of section 17 (4), all that is possible is to issue one notification relating to land to which section 17 (1) applies and another notification relating to land to which section 17 (1) cannot apply. Further if both these kinds of land are included in the notification under section 4 (1), the issue of two notifications under section 6 follows from the special provisions contained in section 17 (1) and section 17 (4) and not from the provisions of sections 4, 5-A and 6. The present is not a case of this kind, for the notification under section 4 (1) in this case issued in May, 1949, did not contain any direction relevant to section 17 (4). It is true that the declaration under section 6, dated 12th August, 1960, contains a direction under section 17 (4), but the effect of that merely is to allow the Government to take possession of the land within 15 days after the issue of notice under section 9 (1). This is on the assumption that a direction under section 17 (4) can be issued along with the notification under section 6 as to which we express no opinion. We are therefore of opinion that the provisions in section 17 (4) do not lead to the conclusion that section 6 contemplates successive notifications following one notification under section 4 (1). As we interpret sections 4, 5-A and 6 that is not the intention in a normal case. Even in a case of urgency there can at the most be only two notifications under section 6 following one notification under section 4 (1), one relating to land which is covered by section 17 (1) and the other relating to land which is not covered by section 17 (1); provided both kinds of land are notified by any notification under section 4 (1). As we have said even that is not necessary for we are of opinion that in such a case the Government can issue two notifications under section 4 (1), one relating to land to which section 17 (1) applies and the other relating to land to which section 17 (1) does not apply and thereafter there will be two notifications under section 6 each following its own predecessor under section 4 (1).

Then reliance is placed on section 48 which provides for withdrawal from acquisition. The argument is that section 48 is the only provision in the Act which deals with withdrawal from acquisition and that is the only way in which Government can withdraw from the acquisition and unless action is taken under section 48 (1) the notification under section 4 (1) would remain (presumably for ever). It is urged that the only way in which the notification under section 4 (1) can come to an end is by withdrawal under section 48 (1). We are not impressed by this argument. In the first place, under section 21 of the General Clauses Act (X of 1897), the power to issue a notification includes the power to rescind it. Therefore it is always open to Government to rescind a notification under section 4 or under section 6, and withdrawal under section 48 (1) is not the only way in which a notification under section 4 or section 6 can be brought to an end. Section 48 (1) confers a special power on Government of withdrawal from acquisition without cancelling the notifications under sections 4 and 6, provided it has not taken possession of the land covered by the notification under section 6. In

such circumstances the Government has to give compensation under section 48 (2). This compensation is for the damage suffered by the owner in consequence of the notice under section 9 or of any proceedings thereafter and includes costs reasonably incurred by him in the prosecution of the proceedings under the Act relating to the said land. The notice mentioned in sub section (2) obviously refers to the notice under section 9 (1) to persons interested. It seems that section 48 refers to the stage after the Collector has been asked to take order for acquisition under section 7 and has issued notice under section 9 (1). It does not refer to the stage prior to the issue of the declaration under section 6. Section 5 says that the officer taking action under section 4 (2) shall pay or tender payment for all necessary damage done by his acting under section 4 (2). Therefore the damage if any caused after the notification under section 4 (1) is provided in section 5. Section 48 (2) provides for compensation after notice has been issued under section 9 (1) and the Collector has taken proceedings for acquisition of the land by virtue of the declaration under section 7. Section 48 (1) thus gives power to Government to withdraw from the acquisition without cancelling the notifications under sections 4 and 6 after notice under section 9 (1) has been issued and before possession is taken. This power can be exercised even after the Collector has made the award under section 11 but before he takes possession under section 15. Section 48 (2) provides for compensation in such a case. The argument that section 48 (1) is the only method in which the Government can withdraw from the acquisition has therefore no force because the Government can always cancel the notifications under sections 4 and 6 by virtue of its power under section 21 of the General Clauses Act and this power can be exercised before the Government directs the Collector to take action under section 7. Section 48 (1) is a special provision for those cases where proceedings for acquisition have gone beyond the stage of the issue of notice under section 9 (1) and it provides for payment of compensation under section 48 (2) read with section 48 (3). We cannot therefore accept the argument that without an order under section 48 (1) the notification under section 4 must remain outstanding. It can be cancelled at any time by Government under section 21 of the General Clauses Act and what section 48 (1) shows is that once Government has taken possession it cannot withdraw from the acquisition. Before that it may cancel the notifications under sections 4 and 6 or it may withdraw from the acquisition under section 48 (1). If no notice has been issued under section 9 (1) all that the Government has to do is to pay for the damage caused as provided in section 5, if on the other hand a notice has been issued under section 9 (1) damage has also to be paid in accordance with the provisions of section 48 (2) and (3). Section 48 (1) therefore is of no assistance to the appellant for showing that successive declarations under section 6 can be made with respect to land in the locality specified in the notification under section 4 (1).

Then reference is made to section 49 (2) and (3). These sub sections lay down a special provision applicable in certain circumstances. Among the factors to be taken into consideration in fixing the compensation is the damage if any sustained by the person interested at the time of the Collector's taking possession of the land by reason of severing such land from his other land. Section 49 (2) provides that if a person is claiming an unreasonable and excessive compensation for this kind of damage the Government can order the acquisition of the whole of the land even though under section 6 only part of the land may have been declared. Sub section (3) provides that in such a case no action under section 6 to section 10 would be necessary and that all that the Collector is to give an award under section 11. The argument is that section 49 (3) does not mention section 4 and therefore it follows that successive notifications under section 6 can be issued with respect to land in the locality specified in the notification under section 4 (1). We have not been able to understand how this follows from the fact that section 4 (1) is not mentioned in section 49 (3). As we have said already section 49 (2) and (3) provide for a very special case and

the order of Government under section 4) (2) may in a sense be taken to serve the purpose of section 4 (1) in such a special case. Thereafter all that section 49 (3) provides is that the Collector may proceed straight off to determine compensation under section 11, the reason for this being that all the other steps necessary for determining compensation under section 11 have already been taken in the presence of the parties.

Lastly it is urged that vesting is also contemplated in two stages and that shows that successive notifications can be issued under section 6 following one notification under section 4 (1). Section 16 provides for taking possession and vesting after the award has been made. Section 17 provides for taking possession and consequent vesting before the award is made in case of urgency. We fail to see how these provisions as to vesting can make any difference to the interpretation of sections 4, 5-A and 6. Section 16 deals with a normal case where possession is taken after the award is made while section 17 (1) deals with a special case where possession is taken fifteen days after the notice under section 9 (1). Vesting always follows taking of possession and there can be vesting either under section 16 or under section 17 (1) depending upon whether the case is a normal one or an urgent one. What we have said with respect to section 17 (1) and section 17 (4) would apply in this matter of vesting also and if the matter is of urgency the Government can always issue two notifications under section 4, one relating to land urgently required and covered by section 17 (1) and the other relating to land not covered by section 17 (1). The argument based on these provisions in section 16 and section 17 can have no effect on the interpretation of sections 4, 5-A and 6 for reasons which we have given when dealing with sections 7 (1) and 17 (4). We are therefore of opinion that the High Court was right in holding that there can be no successive notifications under section 6 with respect to land in a locality specified in one notification under section 4 (1). As it is not in dispute in this case that there have been a number of notifications under section 6 with respect to this village based on the notification under section 4 (1), dated 16th May, 1949, the High Court was right in quashing the notification under section 6 issued on 12th August, 1960, based on the same notification under section 4 (1).

The petition had also raised a ground that the notification under section 6 was vague. However, in view of our decision on the main point raised in the case we express no opinion on this aspect of the matter.

The appeal therefore fails and is hereby dismissed with costs.

K.S.

*Appeal dismissed.*

### THE SUPREME COURT OF INDIA. (Civil Appellate Jurisdiction.)

PRESENT:—P.B. GAJENDRAGADKAR, C.J., K.N. WANCHOO, M. HIDAYATULLA, J. C. SHAH AND S. M. SIKRI, JJ.

Laliteshwar Prasad Sahi

.. *Appellant\**

v.

Bateshwar Prasad and others

.. *Respondents.*

*Representation of the People Act (XLIII of 1951) (as amended by Act LVIII of 1958), section 7 (d)—Scope—Effect of amendment made in 1958—Section as amended if embraces only executory contracts—Contract in contravention of Article 299 of the Constitution of India (1950) and in fact not ratified—If falls within the ambit of section 7 (d).*

*Constitution of India (1950), Articles 133 and 136—Representation of the People Act (XLIII of 1951), section 116-B—Jurisdiction conferred by Articles 133 and 136—Cannot be restricted by section 116-B*

*Per Majority*—After the amendment of section 7 (d) of the Representation of the People Act, 1951, by Act LVIII of 1958 there has been a change in the wording. One change in quite clear and that is that the contract now after amendment, must have been entered in the course of his trade or business by a person with the appropriate Government. Previously, i.e., before amendment in 1958, it need not have been a contract in the course of trade or business. The words were much wider and included any contract entered into for his benefit or on his own account or a contract in which he had any share or benefit or interest. To this extent the Legislature by its amendment clearly narrowed the area of the disqualification. But it will not be correct to contend that the change has gone further and the section as amended only embraces executory contracts but not executed contract. The Legislature has made no change in this respect for under the old provision also it was necessary for a contract to have subsisted at the relevant time. Both executed and executory contracts are included within the bar of section 7 (d) as amended. Accordingly, a contract for the supply of goods or for execution of any works does not cease to subsist only because the goods had been supplied or work had been executed. It continues to subsist till payment is made and the contract is fully discharged.

A contract entered into in contravention of Article 299 of the Constitution of India would not be a disqualification under section 7 (d) where the Government has not in fact ratified the contract. If it is held that this type of transaction is covered by section 7 (d) then the word "contract" in that section will have no effect and would amount to substituting the word "agreement" for it. The Legislature has not chosen to use the word "agreement" but has used the word contract. Therefore, a mere agreement entered into in contravention of Article 299 of the Constitution of India and in fact not ratified cannot be called a contract within the meaning of section 7 (d).

*Per Minority*—The Representation of the People Act, 1951, as amended in 1958 has restricted the conditions which import a disqualification under section 7 (d). The two conditions now are that the contract must be in the course of the candidate's trade or business, and it must be for supply of goods or for execution of any works undertaken by the Government. Contracts in respect of services undertaken for the appropriate Government are apparently not within section 7 (d) as amended. The amended section again requires that there must be a contract entered into by the candidate. Mere interest in a contract, unless the candidate has entered into the contract directly or through an agent would apparently not disqualify him. But the amendment has not made any change in the condition that the contract must be subsisting at the relevant time. If there was no subsisting contract, neither under section 7 (d) before it was amended, nor after it is amended, would the disqualification be incurred. The expression "there subsists a contract" in section 7 (d) includes cases in which one party has performed his part of the contract and the part performable by the other party remains.

A contract is not, because it is not executed in the manner or in the form prescribed by Article 299 of the Constitution of India, unlawful. It is always open to the State notwithstanding informality in the mode of execution of the contract to accept liability under the terms of the contract. Absence of a formal contract in the terms of Article 299 of the Constitution of India will not therefore affect the operation of disqualification prescribed by section 7 (d).

*By Majority (Hidayatullah and Shah, JJ., dissenting)*—In the instant case though there was an oral contract for execution of certain construction works between Respondent No. 1 and the Executive Engineer of the Public Works Department of the Bihar Government, the Bihar Government not having chosen to ratify the same subsequently, there was no subsisting contract between the Bihar Government and Respondent No. 1 when he filed his nomination paper and so his election to the Bihar Legislative Assembly was not void by reason of any disqualification incurred by him under section 7 (d) of the Representation of the People Act, 1951.

*Per Hidayatullah and Shah, JJ.*—By section 116-B of the Representation of the People Act, the jurisdiction conferred upon the Supreme Court by Articles 133 and 136 of the Constitution of India is not, and cannot be restricted. If the circumstances of the case justify, the Supreme Court has power, and is indeed under a duty, to set aside the verdict of the High Court. A person who has a contractual relationship between him and the executive would, on getting elected, be able to bring pressure to bear upon the executive to settle his claim or to secure advantage to which he

may not be entitled. This is the scheme underlying section 7 (d) of the Representation of the People Act. If, on the evidence subsistence of a contract which disqualifies a candidate under section 7 (d) is established, the Supreme Court would not be justified in refusing to give effect to its conclusion merely because the High Court has come to a contrary conclusion.

Appeal from the Judgment and Order, dated 25th April, 1964, of the Patna High Court in Election Appeal No. 11 of 1963.

*Purushottam Triumdas*, Senior Advocate, (*D. Gopurdhum*, Advocate, with him), for Appellant.

*Sarjoo Prasad*, Senior Advocate, (*Nagendra Kumar Roy* and *K. K. Sinha*, Advocates, with him), for Respondent No. 1.

The following Judgments were delivered :

*Sikri, J.* (on behalf of *P. B. Gaiendragadkar, C.J., K. N. Wanchoo, J.*, and for himself)—This is an appeal by certificate granted by the High Court of Patna, directed against the judgment of the said High Court reversing the decision of the Election Tribunal, Muzaffarpur. This appeal arises out of the election of the respondent, Shri Bateshwar Prasad, to the Bihar Legislative Assembly from Lal Ganj North Constituency. The appellant was one of the candidates. He filed an election petition No. 133 of 1962, alleging *inter alia* that the election of respondent No. 1, Shri Bateshwar Prasad, was void as he was disqualified under section 7 (d) of the Representation of the People Act, 1951, hereinafter referred to as the Act. His complaint was that respondent No. 1 had entered into various contracts with the Government and that these contracts were subsisting on January 14, 1962, the date fixed for filing nomination papers. The Election Tribunal, after reviewing both oral and documentary evidence, held that the respondent had entered into contracts to do Mosaic flooring work in the Rajendra Surgical Block of Patna Medical Hospital and that these were subsisting on the date of the nomination, viz., 14th January, 1962. The Election Tribunal further held that by virtue of clause 3 (c) of the conditions embodied in the agreement, Exhibit 'D', it was not at all necessary for the Public Works Department to have entered into a contract with the respondent's company, called the Patna Flooring Company. In the result, the Election Tribunal declared the election of Respondent No. 1 to the Bihar Legislative Assembly from the Lal Ganj North Constituency as void, but refused the prayer of the petitioner before it to be declared elected.

Both sides appealed to the High Court but we are only concerned with the election appeal No. 11 of 1963, filed by Bateshwar Prasad, the returned candidate. Before the High Court three points were taken:

(1) The appellant was not a contractor under the State Government for the mosaic work to be done in the Rajendra Surgical Block, but that at all relevant times, he was a sub-contractor under one G. P. Saxena, who was a contractor under the State Government for the purpose;

(2) Assuming that there was a contract within the meaning of section 7 (d) of the Representation of the People Act, 1951 (XLIII of 1951), sometime, there was no subsisting contract when the appellant had filed his nomination paper in 1962 and thereafter;

(3) Assuming again that there was a contract between the appellant and the State Government sometime, the contract alleged was void, in view of Article 299 (1) of the Constitution of India, so that the Tribunal could not have held that the appellant was disqualified to be chosen as a candidate.

The High Court reviewed the entire evidence and came to the conclusion on point No. 1 above that the appellant was not a contractor under the State Government but continued to be a sub-contractor under Saxena for mosaic work. It also differed from the Election Tribunal on the interpretation of clause 3 (c) of Exhibit 'D'. On the second point, the High Court felt that in view of its



decision on the first point, the question was of mere academic interest and there might be substance in the argument of the learned counsel for the respondent that this question ought not to be allowed to be raised at this stage. Regarding the third point, the High Court held that *Chaturbhuj's case* (*Chatturbhuj Vithaldas Jasani v. Moreshwar Parashram*<sup>1</sup>) was distinguishable because in the instant case the State Government had not accepted the performance of the contract by the appellant. It further held that since the decision in *Chatturbhuj's case*<sup>1</sup> the law had been amended by the amendment of section 7 (d) and the effect of the amendment was 'that the candidate shall be disqualified for being chosen as a member only if there still exists in substance at the relevant time a valid and binding contract between him and the appropriate Government'. The High Court further observed that 'it is difficult to accept the contention of the learned Counsel for the respondent that a transaction may be void under the Contract Act but its actual existence may still be a disqualification under present section 7 (d)'. In conclusion the High Court held that Bateshwar Prasad had not incurred a disqualification under section 7 (d) of the Act and accordingly set aside the judgment and order of the Election Tribunal.

Mr Purshottam the learned Counsel for the appellant, has urged before us that the High Court was wrong in holding that the amendment had made any change in the law on the question whether the contract which is void under Article 299 of the Constitution is or is not a contract within section 7 (d) of the Act. He says that the reasoning of the decision of this Court in *Chatturbhuj's case*<sup>1</sup> still holds the field. He then says that the High Court came to a wrong conclusion on the question of fact in this case namely, whether the contracts subsisted or not at the relevant date and that this Court should reverse the finding even though it is a finding of fact. Mr Sarjoo Prasad the learned Counsel for the respondent, controverts this point and he urges that this Court should not go into the question of fact. On the question of law, he says that the present section 7 (d) is quite different from the old section 7 (d) and that the Supreme Court decision cannot be applied to the wording of the present section.

Coming to the law point it is necessary to set out the old and the new statutory provisions, and these are as under:

7. A person shall be disqualified for being chosen as and for being a member of either House of Parliament or of the Legislative Assembly or Legislative Council of a State

(d) if whether by himself or by any person or body of persons in trust for him or for his benefit or on his account he has any share or interest in a contract for the supply of goods to or for the execution of any works or the performance of any services undertaken by the appropriate Government.

*As amended*

7. A person shall be disqualified for being chosen as and for being a member of either House of Parliament or of the Legislative Assembly or Legislative Council of a State

(d) if there subsists a contract entered into in the course of his trade or business by him with the appropriate Government for the supply of goods to or for the execution of any works undertaken by that Government.

Comparing the old section and the new section there is no doubt that there has been a change in the wording. One change is quite clear and that is that the contract now must have been entered in the course of his trade or business by a person with the appropriate Government. Previously it need not have been a contract in the course of trade or business. The words were much wider and included any contract entered into for his benefit or on his own account or a contract in which he had any share or interest. To this extent the Legislature has clearly narrowed the area of this disqualification. But is Mr Sarjoo Prasad right in contending that the change has gone further and that it only embraces executed contracts but not executed contracts? In our opinion the Legislature has made-

no change in this respect for under the old provision it was also necessary for a contract to have subsisted at the relevant time. This Court had in *Chatturbhuj's case*<sup>1</sup> included both executed and executory contracts within the provision of section 7 (d) and had refused to follow the English rulings to the contrary. We cannot go into the question whether this was rightly done or not for we are bound by that decision. Accordingly, following *Chatturbhuj's case*<sup>1</sup> we hold that a contract for the supply of goods or for the execution of any works or the performance of any services undertaken does not cease to subsist only because the goods had been supplied or work had been executed or services performed. It continues to subsist till payment is made and the contract is fully discharged by performance on both sides.

But whether *Chatturbhuj's case*<sup>1</sup> applies when a void contract has not been accepted or ratified by the Government, we will consider presently. Mr. Purshottam next contends that the respondent entered into two contracts and they were subsisting at the date of the nomination as the respondent had not been paid for his work and as a matter of fact a suit is pending against the Government for recovery of the money. He has taken us through the documentary evidence and it is now necessary to deal with it. The documentary evidence may be conveniently divided into two groups. The first group relates to documents bearing on the formation of the alleged contract. It appears that one G. P. Saxena had entered into a contract. Exhibit D, for the construction of a Surgical Block in the Patna Medical College compound, Patna, and this contract was entered into in 1951, and the respondent was working as a sub-contractor under him. It further appears that there were some disputes between Saxena and the Public Works Department and he was not completing the work in time or to their satisfaction. Consequently, the Sub-Divisional Officer enquired from the Patna Flooring Company whether they would be willing to complete the work. Patna Flooring Company, on 17th April, 1955, wrote to the Executive Engineer, through the Sub-Divisional Officer, and gave their quotations and terms and conditions. It may be noted here that these terms were different from the terms under which Saxena had taken the contract. This is an important fact and it is necessary to bear this in mind. On 25th April, 1955, the Sub-Divisional Officer forwarded this letter to the Executive Engineer with the remarks that "the contractor is being asked to start work immediately as per your orders." The Executive Engineer noted on this letter as follows: "It is hoped necessary notice has been given by you to the defaulting contractors." The Sub-Divisional Officer noted that

"the contractor had already been served with a notice and a copy to your office vide T.O. No. 497, dated 20th April, 1955. The Patna Flooring Company has been ordered to start work and a copy of that submitted to you vide T.O. No. 504, dated 20th April, 1955.

On 20th April, 1955, the Sub-Divisional Officer wrote to the Patna Flooring Company to "start immediately the remaining mosaic floor and dado work in the R.S. Block and finish the work completely within a fortnight as promised by you." He endorsed a copy of this letter to the Executive Engineer. He also sent a notice to Saxena informing him that as he had failed to do (in spite of repeated asking) the remaining mosaic work of floor and dado in Surgical Block, the remaining work was being got done by other agency and the cost would be recovered from him. He endorsed a copy of this to the Executive Engineer noting that the remaining work was being done by the Patna Flooring Company, as instructed by him. On 13th May, 1955, the Executive Engineer warned Patna Flooring Company to finish the work within the stipulated time and that no extension of time would be granted if the work would be left unfinished. On 23rd May, 1955, the Sub-Divisional Officer again wrote to Patna Flooring Company saying that necessary instructions regarding slope etc. had already been given at the site, that there was no cause for delay in work and asked them to push up the

1. (1954) S.C.J. 315 : (1954) S.G.R. 817

progress of the work as it was a top priority work. It appears that by 25th May, 1955, 90 per cent of the work had been done and the Patna Flooring Company wrote to the Sub-Divisional Officer requesting that the Special Officer in charge of the said work be ordered to submit an on account bill for making payment to them at an early date.

Mr Purshottam contends that on a perusal of the correspondence contained in this group it is quite clear that an oral contract for the construction of work was entered into between the Executive Engineer and the Patna Flooring Company and that the High Court had erred in holding that no such contract ever came into being. He points out that under clause 3 (c) of the Contract, Exhibit D, the Executive Engineer was entitled to ask the Patna Flooring Company to do the work. Clause 3 (c) reads as follows:

"Clause 3—In any case in which under any clauses of this contract the contractor shall have rendered himself liable to pay compensation amounting to the whole of his security deposit in the hands of Government (which whether paid in one sum or deducted by instalments) to Executive Engineer on behalf of the Governor of Bihar shall have power to adopt any of the following courses as he may deem best suited to the interests of Government:

(c) To measure up the work of the contractor and to take such part of the work of the contract as shall be unexecuted out of his hands and to give it to another contractor to complete, in which case any expenses which may be incurred in excess of the sum which would have been paid to the original contractor if the whole work had been executed by him (of the amount of which excess the certificate in writing of the Executive Engineer shall be final and conclusive) shall be borne and paid by the original contractor and may be deducted from any money due to him by Government under the contract or otherwise or from his security deposit or the proceeds of sale thereof or a sufficient part thereof."

We are inclined to agree with Mr Purshottam that the correspondence in this group clearly discloses an agreement for the execution of work between the Executive Engineer and the Patna Flooring Company, and the Election Tribunal was quite right in coming to this conclusion. But we may say that the Election Tribunal was not right in holding that clause 3 (c) got rid of Article 299 of the Constitution. Any work which is given in exercise of the powers under clause 3 (c) has also to comply with the provisions of Article 299 of the Constitution. What the effect of this is we will consider later.

Mr Sarjoo Prasad, however, says that assuming that a contract was entered into, the contract did not subsist at the time of the nomination because the Government had refused to ratify the contract given under clause 3 (c) and that *Chatturbhuj's case*<sup>1</sup> does not lay down that a contract which has not been ratified by the Government is a contract within section 7 (d) of the Act. It seems to us that there is a great deal of force in the contention of the learned counsel. It is true that this Court has held in a number of cases, the latest being *New Marine Coal Co. (Bengal) v. The Union of India*<sup>2</sup>, that a contract entered into with the Government in contravention of section 175 (3) of the Government of India Act, 1935, or Article 299 of the Constitution is void and unenforceable. But in *State of West Bengal v. B K Mondal*<sup>3</sup> this Court distinguished *Chatturbhuj's case*<sup>1</sup> on the ground that in the latter case

"this Court was dealing with the narrow question as to whether the impugned contract for the supply of goods would cease to attract the provisions of section 7 (d) of the Representation of the People Act on the ground that it did not comply with the provisions of Article 299 (1), and this Court held that notwithstanding the fact that the contract could not be enforced against the Government it was a contract which fell within the mischief of section 7 (d)". This Court further observed that:

"all that this Court meant by the said observation (of Bose, J in *Chatturbhuj's case*<sup>1</sup> at p 835 quoted below) was that the contract made in contravention of Article 299 (1) could be ratified by the Government if it was for its benefit and as such it could not take the case of the contractor outside the purview of section 7 (d). The contract which is void may not be capable of ratification but a case according to the Court the contract in question could have been ratified if it was not void in that technical sense. That is all that was intended by the observation in question."

1 (1954) S.C.J. 315 (1954) S.G.R. 817 at 835 3 A.L.R. 1962 S.C. 779

2 A.L.R. 1964 S.C. 152

But the question arises whether *Chatturbhuj's case*<sup>1</sup> can be extended to cover a case where the contract has in fact not been ratified. Bose, J., had observed in *Chatturbhuj's case*<sup>1</sup> as follows:

"In the present case, there can be no doubt that the Chairman of the Board of Administration acted on behalf of the Union Government and his authority to contract in that capacity was not questioned. There can equally be no doubt that both sides acted in the belief and on the assumption, which was also the fact, that the goods were intended for Government purposes, namely, amenities for the troops. The only flaw is that the contracts were not in proper form and so, because of this purely technical defect, the principal could not have been sued. But that is just the kind of case that section 230 (3) of the Indian Contract Act is designed to meet. .... It only meant that the principal cannot be sued : but we take it there would be nothing to prevent ratification, especially if that was for the benefit of Government. There is authority for the view that when a Government officer acts in excess of authority Government is bound if it ratifies the excess : see *The Collector of Masulipatam v. Cavalry Venkata Narrainapah*<sup>2</sup>.

It seems to us that the decision in *Chatturbhuj's case*<sup>1</sup> cannot be extended to cover a case where the Government has in fact not ratified the contract. If we were to hold that this type of transaction is covered then we would be giving no effect to the word "contract" in section 7 (d) and we would be substituting the word "agreement" for it. The Legislature has not chosen to use the word "agreement" but has used the word "contract". Therefore, a mere agreement entered into in contravention of Article 299 and in fact not ratified cannot be called a "contract" within section 7 (d) of the Representation of People Act.

The question then arises whether the Government did or did not ratify the oral contract entered into between the Executive Engineer and the Patna Flooring Company. In this connection, Mr. Sarjoo Prasad, relies on a number of documents. The first document he refers to is Exhibit A-2, dated 12th July, 1955. The Sub-Divisional Officer wrote to the Patna Flooring Company as follows:

"It is disappointing to note that in spite of my repeated askings you have not submitted your final bill for the mosaic work uptill now. I have been personally explaining to you the whole position and you promised to submit your final correct bill on Friday the 8th July, 1955, so that I may ask the contractor Shri G.P. Saxena to pay you off finally and settle your accounts immediately."

It appears that something happened between 25th May, 1955 and 12th July, 1955. According to the respondent, what happened was that Saxena approached the Superintending Engineer and the Superintending Engineer ordered that Saxena would continue to be the contractor as before and no contract would be given to any firm. The respondent stated this in his evidence as R.W. 32. It is objected that this is hearsay and this part of the statement is not admissible. There is some force in this contention and we omit this part of the statement from consideration. But apart from this oral evidence it is quite clear from this letter that something happened, otherwise it was not necessary to use the words "personally explaining to you the whole position" in this letter, and it is not understandable why the Patna Flooring Company was being asked to submit the bill to Saxena. This inference is strengthened by subsequent correspondence. By letter, dated 13th July, 1955, Exhibit A-3, the Sub-Divisional Officer acknowledged the receipt of the bill and said that he had sent it to Saxena for making settlement. Exhibit A-17, dated 20th July, 1955, is significant. The Sub-Divisional Officer requested Saxena to issue orders to his contractors "to mend and rectify all the cuttings and damages properly and nicely so that the building is in a fit condition for handing over on 1st August, 1955". On 23rd July, 1955, Saxena endorsed it to the Patna Flooring Company for information and necessary action and with the request to rectify the defects pointed out to the Patna Flooring Company and complete the remaining portions of works and give final polishes thereto by the schedule date. It is not understandable why Saxena was endorsing this for action to Patna Flooring Company unless the Government had

1. (1954) S.C.J. 315 : (1954) S.C.R. 817 at 835.

2. (1861) 8 M.I.A. 529 at 554.

chosen not to ratify the contract with the Patna Flooring Company and was still treating him as a contractor. It is also significant that it has not been alleged or proved that any similar letter was written to Patna Flooring Company direct by the Sub-Divisional Officer. On 21st July, 1955, a "statement showing upto 21st day of July, 1955, correct amount for the mosaic work done by M/s Patna Flooring Company in the Rajendra Surgical Block, Patna Medical College and Hospital, Patna—Transactions between Shri G P Saxena, Proprietor M/s G P Saxena and Company and M/s Patna Flooring Company" was made out and this statement of account shows 'Bill No BP/1833/45/55 dated 13th July, 1955, through the Sub-Divisional Officer No 111 Sub-Division, Construction Division Patna—bill for Rs 14 000-9 0' and Saxena agreed to settle this bill, and a copy of that statement was forwarded to the Executive Engineer for record with reference to the discussion which was held between Saxena and Prasad in his presence and the presence of the Sub-Divisional Officer. This statement shows that the Government Officer was acknowledging that the liability for work done by the Patna Flooring Company would be that of Saxena. If a direct contract between the Patna Flooring Company and the Government still subsisted, all this arrangement seems to be uncalled for.

Mr Sarjoo Prasad further points out an important fact that when Saxena submitted the bill to the Government, he not only charged for the work done by the Patna Flooring Company but he charged it at the rates contained in his own contract and not in the quotations dated 14th April, 1955 given by the Patna Flooring Company. We agree with him that this is a very significant fact and shows that as far as the Government was concerned, the original contract stood and the Government had not chosen to treat Patna Flooring Company as a contractor, but only as a sub-contractor working under Saxena.

Mr Purshottam laid a great deal of stress on the pleadings in the money suit No 53 of 1959. There is no doubt that the plaintiff in the money suit filed by the Patna Flooring Company shows that the Bateshwar Prasad plaintiff was trying to make out that there was a direct contract entered into between the PWD and the plaintiff, but even so, the plaintiff does not make them solely responsible. We have also come to a finding that there was admittedly a contract in the beginning. The fact that the plaintiff does not allege any subsequent non acceptance or refusal to ratify by the Government would not estop the respondent from proving in this case that on the material on record it is clear that the Government had not ratified the contract with the respondent but confirmed the original contract with Saxena. The written statement filed by the Government in the money suit cannot be used to destroy the inference which clearly arises from the documents referred to above. It is doubtful whether the written statement can be taken into consideration at all.

In the result we hold that no contract between respondent No 1 and the Government subsisted at the relevant time *viz.*, the date of the nomination and the respondent was not disqualified under section 7 (d). The appeal accordingly fails and is dismissed with costs.

*Shah J*—(On behalf of *Hidayatullah, J.*, and for himself) At the general elections held in February, 1962 the appellant Laliteswar Prasad Sahi and the first respondent Bateshwar Prasad contested a seat from the Lalgaon North Constituency in the Bihar Legislative Assembly. The first respondent was declared elected. The appellant then filed a petition before the Election Tribunal, Muzaffarpur, for an order declaring the election of the first respondent void on the ground that the first respondent was disqualified under section 7 (d) of the Representation of the People Act, 1951—hereinafter called 'the Act'—for being a member of the Bihar Legislative Assembly, and for an order that the appellant be declared duly elected. The Election Tribunal disqualified the first respondent

under section 7 (d) of the Act because in the view of the Tribunal on the date on which the first respondent filed the nomination paper there was a subsisting contract between him and the State of Bihar for execution of works undertaken by the Government. The Tribunal declined to declare the appellant duly elected.

Against the order passed by the Tribunal, appeals were preferred to the High Court of Patna by the appellant and the first respondent under section 116-A of the Act. In the view of the High Court, the first respondent was not disqualified from being elected a member of the Bihar Legislative Assembly because there was at the date of nomination no subsisting contract for supply of goods or execution of works between the first respondent and the Government of Bihar. The appeal filed by the first respondent was accordingly allowed and the appeal filed by the appellant was dismissed. With certificate granted by the High Court, the appellant has preferred this appeal.

Section 7 (1) (d) of the Act as it stood at the relevant time read as follows:

"A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament, or of the Legislative Assembly or Legislative Council of a State

(d) If there subsists a contract entered into in the course of his trade or business by him with the appropriate Government for the supply of goods to, or for execution of any works undertaken by that Government."

The appellant contends that the first respondent was disqualified from being a member because there was between him and the Government of Bihar a subsisting contract relating to execution of works for the Government. Two components of the issue to be determined this appeal are: whether at the relevant time there was between the State of Bihar and the first respondent a contract in the course of the first respondent's trade or business for execution of any work undertaken by that Government and whether at the material time the contract was subsisting. The Trial Court answered both the components in the affirmative. The High Court was of the view that there was no contract at any time between the State of Bihar and the first respondent.

The appellant's case was that the first respondent and his son Bhupendra Nath Prasad carried on business of executing mosaic flooring, plumbing and sanitary works in the name M/s. Patna Flooring Company, that the first respondent on behalf of M/s. Patna Flooring Company had obtained contracts from the Government of Bihar for doing "mosaic and dado works" at Rajendra Surgical Block of Patna General Hospital, and that in connection with the said contracts the first respondent had filed suit No. 53 of 1959 in the Court of the Subordinate Judge, Patna, against the State of Bihar the Executive Engineer, P.W.D. (Construction Division No. 1) and others for a decree for Rs. 18,500 and it was claimed in the plaint in that suit that there was a "direct contract" between the first respondent and the State of Bihar, and on that account the first respondent was disqualified under section 7 (d) of the Act from being a member of the Bihar Legislative Assembly. The first respondent denied that he was looking after the business of M/s. Patna Flooring Company on the date of filing of the nomination paper and contended that the contract for doing mosaic work at Rajendra Surgical Block of the Patna Medical College General Hospital was between G.P. Saxena and the Government of Bihar, and that he—the first respondent—had never entered into a contract with the Government of Bihar for doing mosaic work at Rajendra Surgical Block and that in any event there was no subsisting contract at the date of his nomination as a candidate.

There is on the record a mass of documentary evidence which throws light upon the question in dispute. Saxena had submitted in March, 1951, his tender for the construction work of the Rajendra Surgical Block at Patna, which was undertaken by the Government of Bihar. Items 39 and 40 of the contract related to "mosaic flooring and dado." For "mosaic flooring" the rate

tendered and accepted was Rs 2-4-0 per sq ft and for "mosaic dado" the rate was Rs 2-8-0 per sq ft. By clause 2 of the conditions of the contract, it was provided *inter alia*, that the contractor shall strictly carry out the work within the time stipulated with all due diligence and that the contractor shall pay as compensation amounts equal to 1/3 per cent, on the estimated cost of the whole work as shown by the tender for every day that the work remains uncommenced or unfinished after the agreed dates. By clause 3 it was provided that in any case in which the contractor shall have rendered himself liable to pay compensation amounting to the whole of his security deposit in the hands of the Government, the Executive Engineer shall have power to adopt any of the following courses, as he may deem best suited to the interests of Government

(a) To rescind the contract,

(b) To employ labour paid by the P W D to carry out the work, or any part of the work, debiting the contractor with the cost of labour,

(c) To take away such part of the work of the contract as shall be unexecuted out of his hands, and to give it to another contractor for completion

The first respondent was working as a sub-contractor under Saxena in certain sections of the work undertaken by the latter. In April, 1955, Saxena was unwilling or unable to complete the "mosaic flooring" and "mosaic dado" under his contract, and negotiations took place between the Executive Engineer, Construction Division, and the first respondent regarding completion of that work by the first respondent. On 17th April, 1955, the first respondent addressed a letter Exhibit I-G to the Executive Engineer recording the conversation he had with the Executive Engineer relating to the rates of mosaic work etc., and submitted his terms and conditions. The rates offered by the first respondent were substantially lower than those under the contract with Saxena, but he requested that certain construction materials be supplied by the Department on his account, and the price thereof may be debited against his bill. The Executive Engineer made a note on this letter "It is hoped, necessary notice has been given... to the defaulting contractor". On 20th April, 1955, the Sub-Divisional Officer made a note that the contractor (Saxena) had "already been served with a notice" and that the first respondent's firm had been ordered to start the work. On 20th April 1955, the Sub-Divisional Officer addressed a letter Exhibit I-C to M/s Patna Flooring Company as under

"As ordered by the Executive Engineer please start immediately the remaining mosaic floor and dado work in the R.S Block and finish the work completely within a fortnight as promised by you."

Intimation about entrustment of the work to M/s Patna Flooring Company was also given to Saxena by letter Exhibit I-J. It was stated in that letter

"As you have failed to do (in spite of repeated askings) the remaining mosaic work of floor and dado in Surgical Block, the remaining work is being got done by other agency and the cost will be recovered from your bill which please note"

M/s Patna Flooring Company was called upon by letters, dated 7th May, 1955 and 13th May, 1955 and 23rd May, 1955, to complete the work within the period stipulated. On 25th May, 1955, M/s Patna Flooring Company addressed a letter to the Sub-Divisional Officer informing him that his firm had finished about 90 per cent of the entire work entrusted to them and requested that an "on account payment" may be made to them. There is on the record no further correspondence in regard to the mosaic flooring and dado work in the Surgical Block. On 23rd December, 1955, the Sub-Divisional Officer addressed a letter to M/s Patna Flooring Company referring to an "oral order" of the Executive Engineer and requested the Company to do mosaic work in "two bath rooms and laboratory of the Lecture Theatre" and asked them "to do the work as per instructions". On 4th April, 1956, M/s Patna Flooring Company submitted a

bill for the "flooring and dado work" done in the bath rooms of the Lecture Theatre under the orders of the Executive Engineer and of the Sub-Divisional Officer and requested that payment be made to them. A copy of that letter was sent to the Sub-Divisional Officer along with a copy of the bill for the work done, for information and for immediate payment, but no payment was made. The P.W.D. authorities, it appears, thought that instead of making the payment directly to the first respondent, Saxena should be called upon to pay the amounts due to M/s. Patna Flooring Company for work done by them. This is evidenced by several letters on the record to which we will presently refer.

Interrupting the narrative at this stage, it may be observed that the evidence<sup>e</sup> set out leaves no room for doubt that there were negotiations between M/s. Patna<sup>a</sup> Flooring Company and the Executive Engineer for carrying out "mosaic flooring and dado work" which was part of work Saxena had undertaken to do and which he had failed to complete. The Executive Engineer asked M/s. Patna Flooring Company to carry out that work and the latter submitted its own schedule of rates, and asked for certain facilities which did not form part of Saxena's contract. In our view Exhibit I-G, dated 17th April, 1955, and Exhibit I-C, dated 20th, April, 1955, constitute an offer to execute "the mosaic and dado work" and acceptance thereof on behalf of the Government of Bihar. The work of "mosaic flooring and dado work" in the Rajendra Surgical Block which was part of the contract of Saxena was completed by M/s. Patna Flooring Company in July, 1955, after Saxena was intimated that the work which remained to be done would be completed through other agency. Similarly under the instructions of the Executive Engineer they did the work of "mosaic flooring and dado work" in the bath rooms and the Lecture Theatre sometime after January, 1956. These contracts were not in the form prescribed by section 299 of the Constitution, and the contracts not being expressed to be entered into by the Governor of the State and in the manner directed by the Governor were unenforceable against the State: see *Bikhranj Jaipuria v. Union of India*<sup>1</sup>. But the contracts were not, because they were not executed in the manner or in the form prescribed by Article 299 of the Constitution, unlawful. It is always open to the State notwithstanding informality in the mode of execution of the contract to accept liability arising under the terms of the contract. There is no dispute that the Executive Engineer was competent on behalf of the State to enter into contracts with M/s. Patna Flooring Company in respect of both the items of work. The contracts resulted from offer by M/s. Patna Flooring Company and acceptance by the Executive Engineer. It has been held by this Court that in cases arising under the Act, a contract not enforceable by action against the Government may still be regarded as a contract which disqualifies a person from standing for election as a member of the Legislature under section 7(d): see *Chatturbhuj Vithaldas Jasani v. Moreshwar Parashram and others*<sup>2</sup>. In *Chatturbhuj Vithaldas Jasani's case*<sup>3</sup> no contract was executed in the manner prescribed by Article 299 of the Constitution. The contract in that case was one for supply of goods. The Court in considering whether the existence of a contract not in the form prescribed by Article 299 of the Constitution disqualified a person under section 7(d) observed at page 835:

"It would in our opinion, be disastrous to hold that the hundreds of Government officers who have daily to enter into a variety of contracts, often of a petty nature, and sometimes in an emergency, cannot contract orally or through correspondence and that every petty contract must be effected by a ponderous legal document couched in a particular form. It may be that Government will not be bound by the contract in that case, but that is a very different thing from saying that the contracts as such are void and of no effect. It only means that the principal cannot be sued; but we take it there would be nothing to prevent ratification, especially if that was for the benefit of Government. There is authority for the view that when a Government officer acts in excess of authority Government is bound if it ratifies the excess: see *The Collector of Masulipatam v. Gavalu Venkata Narrainapah*<sup>3</sup>.

1. (1962) 2 S.C.J. 479 : (1962) 2 S.C.R. 880.  
2. (1954) S.C.J. 315 : (1954) S.C.R. 817.

3. (1861) 8 M.I.A. 529 at 554.



It was also held that section 7 (d) of the Act did not require that the contracts at which it strikes should be enforceable against the Government all that it requires is that the 'contract should be for the supply of goods to the Government.' The purpose of the Act, it was observed, is to maintain the purity of the Legislatures and to avoid a conflict between duty and interest, and that it is obvious that the temptation to place interest before duty is great when there is likely to be some difficulty in recovering the money from the Government. Absence of a formal contract in the terms of Article 299 of the Constitution will not therefore affect the operation of disqualification prescribed by section 7 (d) of the Act.

The inference arising from the documentary evidence, which we have already set out, is further strengthened by the admissions made by the first respondent many years after execution of the "mosaic and dado work". In a notice served by him upon the Government of Bihar under section 80 of the Code of Civil Procedure on 3rd January, 1959 for payment of the amount due to him for "mosaic flooring and dado work" in the Rajendra Surgical Block and the bath rooms and lecture theatre in the year 1955-56, M/s Patna Flooring Company stated that "suspension of the work by Saxena made the PWD authorities anxious" and they called upon them to continue the work. It was then stated in paragraph 11

"That the PWD authorities when failed in their attempt to persuade Shri G P Saxena to continue the work approached Sri Bateishwar Prasad one of my said clients to take up the work direct and assured full payment by deducting from the bills of Shri G P Saxena or by preparing direct bills, in the nature of a contract of guarantee.

In paragraph 12 it was stated

"That as a result of the said approach and assurance, letter No BP/1763/28/55, dated 17th April 1955, was addressed by the firm of my clients to the Executive Engineer <sup>quoting rates</sup> rather less than the rates on which Sri G P Saxena got the work from the PWD Department which was confirmed in letter No 504 dated 20th April 1955 from the SDO No 111 Sub-division, Patna wherein the department asked my clients to proceed with the remaining work.

In paragraph 13 it was stated

"That on the receipt of the said letter, dated 20th April 1955 my clients started doing the work and received materials from the PWD Stores from time to time."

In paragraph 14 it was stated

"That the firm of my clients was in direct contract with you and your department"

In paragraph 16, the letter, dated 5th June, 1955, informing the Executive Engineer about the completion of the work is referred to, and it is stated that on 13th July, 1955, M/s Patna Flooring Company had submitted their bill for Rs 14,000 to the Executive Engineer. By this notice the first respondent demanded from the State of Bihar Rs 22,947.07 and Rs 5,000 as damages and loss sustained by M/s Patna Flooring Company.

In the plaint in suit No 53 of 1959 filed by M/s Patna Flooring Company by paragraphs 6, 7 and 8 substantially the same averments were made. In paragraph 7 of the plaint it was stated "Thus it is clear the plaintiffs and their firm began the work under a direct contract from the PWD which also appears from letter Nos 705 and 706, dated 23rd May, 1955, addressed to the plaintiff's firm by the SDO No 111 Sub-division", and in paragraph 8 it was stated that

"The mosaic work done by the plaintiffs had been done under a direct contract from the PWD authorities and Sri G P Saxena had no interest in this mosaic work but if any how it has been entered in the MB in the name of Sri G P Saxena then the payment to the extent of the plaintiffs' dues should be withheld and the same should be paid to the plaintiffs by the PWD authorities."

We are informed at the Bar that suit No 53 of 1959 has as yet not been disposed of.

We are called upon in this case to decide whether it is established that there was a contract between the State of Bihar and the first respondent relating to construction work, which disqualified him from being a member of the Bihar Legislature. We are not concerned to decide whether the contract was enforceable against the State. The evidence already set out in our view abundantly supports the case that there was a contract directly between the first respondent and the State of Bihar relating to the execution of work, and that the contract was made in the course of the first respondent's trade or business.

The first respondent had pleaded in his written statement that there was in fact no contract and that he (the first respondent) had completed the "mosaic and dado work" in the Surgical Block, the bath rooms and the lecture theatre as a sub-contractor of Saxena. In so pleading he sought to ignore the letters Exhibits 1-G, 1-C and the relevant correspondence. No explanation was attempted before the Election Tribunal explaining that correspondence. It was merely urged that the two letters Exhibits 1-G and 1-C between M/s. Patna Flooring Company and the P.W.D. authorities and the other correspondence between the Executive Engineer and Saxena indicated that the "mosaic flooring and dado work" was completed by the first respondent as an agent of Saxena. It is urged in this Court for the first time that assuming that Exhibits 1-G and 1-C amounted to an offer by the first respondent and acceptance thereof by the Executive Engineer, that offer and acceptance thereof could amount to a binding contract between M/s. Patna Flooring Company and the Government of Bihar, only if the Superintending Engineer accepted or ratified the contract and in the absence of any evidence to that effect, the offer and acceptance did not give rise to any contract disqualifying the first respondent under section 7 (d) of the Act.

We may at once observe that the subsequent correspondence and settlement of accounts Exhibit G contain at best ambiguous statements which do not raise any inference in favour of the first respondent. We may briefly refer to this evidence. On 12th July, 1955, the Sub-Divisional Officer addressed a letter to M/s. Patna Flooring Company intimating that it was "disappointing to note that in spite of repeated askings" the firm had not submitted their final bill for the mosaic work till that date. The letter then proceeded:

"I have been personally explaining to you the whole position and you promised to submit your final correct bill on Friday the 8th July, 1955, so that I may ask the contractor Shri G. P. Saxena to pay you off finally and settle your accounts immediately."

This letter clearly indicates that in the view of the Sub-Divisional Officer the bill had to be submitted by the first respondent to the P.W.D. authorities and that they would persuade Saxena on account of whose default the contract with the first respondent was necessitated to pay the amount due to him. The next letter is, dated 13th July, 1955, addressed by the Sub-Divisional Officer to M/s. Patna Flooring Company intimating that the bill of M/s. Patna Flooring Company had been sent to Saxena for immediate settlement and payment, and asking the company to settle the account with Saxena and to receive payment from him and to report to the P.W.D. authorities. On 20th July, 1955, there is another letter from the Sub-Divisional Officer forwarding a copy of letter No. 949, dated 20th July, 1955, which was addressed to Saxena asking the latter to issue orders to his contractors to mend and rectify all the cuttings and damages properly so that the building may be in a fit condition for handing over on 1st August, 1955. A copy of this letter was forwarded to M/s. Patna Flooring Company for their information and necessary action, and they were asked to rectify all the defects pointed out to them and to complete the remaining work by the scheduled date. It may be noticed that Saxena's contract in its entirety was not terminated: only a part of the contract had been taken away from him. Directions had therefore to be given to him to complete the contract of the building and to hand over the same by 31st July, 1955, and to M/s. Patna Flooring Company to rectify all the defects pointed out to

them If M/s. Patna Flooring Company were merely a sub-contractor, there is no reason why a copy of this letter should have been addressed to them and that they should have been asked to rectify the defects On 21st July, 1955, a statement of account was drawn up in respect of the mosaic work done by M/s. Patna Flooring Company in the Rajendra Surgical Block It is described as 'a statement of account of mosaic work between G P Saxena and Messrs Patna Flooring Company' On the credit side of the account are three items Rs 57,443-4-3 in respect of bill, dated 25th November, 1953 Rs 4,719-9-3 in respect of bill, dated 31st March, 1955 and Rs 14,000 in respect of bill, dated 13th July, 1955, through the Sub-Divisional Officer No III Sub-division, Construction Division, Patna On the debit side are various items of payments aggregating to Rs. 49,754-9-3 leaving a balance of Rs 26,408-13-3 Against that amount a cheque for Rs 15,000 is recorded as given on 21st July, 1955, on the Bank of Bihar Ltd, leaving a balance of Rs 11,408-13-3 There are two notes, at the foot of this account The first part of note No (1) deals with the bill, dated 31st March, 1955, which is not material It then proceeds to record that M/s Patna Flooring Company will be responsible for rectification of the defects in mosaic work in bill No. BP/1438/35/55 and 93/55, dated 13th July, 1955 and 31st March, 1955, respectively Note No (2) states that M/s Patna Flooring Company will realise from Saxena immediately the amount of the claim for work included in the third bill This is signed by the first respondent At the foot of these two notes there are two endorsements one signed by Saxena and the other by the first respondent In the endorsement signed by Saxena it is stated that the account was correct and he admitted that Rs. 11,408-13-3, were due from him which he promised "to pay very soon" It was also stated that the terms of the original agreement between Saxena and M/s Patna Flooring Company will also remain operative. The endorsement signed by the first respondent states:

Agreed and accepted the cheque for Rs 15,000 We shall finish the final polish work within a very short time. As the account has been settled today, the 21st July, 1955, I am herewith returning the cheque No BZ/131 08016 dated 18th January, 1955, drawn on the Imperial Bank of India, Patna for Rs 12,000 and balance now stands as mentioned Rs 11,408-13-3 as per settlement, subject to encashment of to-day's cheque No G140696, dated 21st July, 1955, on the Bank of Bihar Ltd, Patna.

A copy of this account was forwarded to the Executive Engineer, Construction Division, through the Sub-Divisional Officer "for information and record with reference to the discussion which was held between" Saxena and the first respondent "in his presence and the presence of the Sub-Divisional Officer No III Sub-Division" Strong reliance was placed upon this document by counsel for the first respondent in support of his claim that there was in truth no contract between the State of Bihar through its P. W. D. authorities and the first respondent, but the contract continued at all material times to subsist between Saxena and the State of Bihar After carefully considering this argument in our view, this document is not susceptible of any such interpretation The P. W. D. authorities had adopted the attitude that even though they were liable to meet the bill of M/s Patna Flooring Company for the work done under the arrangement arrived at between them by Exhibits I-G and I-C they would procure payment of the amount due from Saxena The first respondent had admittedly done the work in respect of two bills, dated 25th November, 1953 and 31st March, 1955, as sub-contractor for Saxena A third bill for Rs. 14,000 had been submitted for the work done by the first respondent for which the bill was sent to the Sub-Divisional Officer Saxena was apparently refusing to make the payment and a meeting was arranged in the presence of the Executive Engineer and the Sub-Divisional Officer in which a consolidated account was made and Saxena agreed to pay the balance of Rs 26,408-13-3 and against which he gave a cheque for Rs 15,000 This statement of account cannot conceivably be utilised in support of the case of the first respondent that there was no contract between him and the P. W. D. authorities representing the State of Bihar: it is merely a settlement

arrived at between the first respondent and Saxena in the presence of the Executive Engineer and the Sub-Divisional Officer under which Saxena agreed to pay the amount of Rs. 11,408-13-3 remaining due on the consolidated account. The settlement at the instance of the Executive Engineer and the Sub-Divisional Officer does not purport to wipe out the contract which was previously arrived at and the construction work done in pursuance of that contract, and the mere endorsement under the signature of Saxena that the terms of the original agreement between him and M/s. Patna Flooring Company will also remain operative only indicates that M/s. Patna Flooring Company may continue to work as sub-contractor of Saxena, lest it might give an impression that the sub-contract between Saxena and M/s. Patna Flooring Company was terminated.

For the work which Saxena failed to complete, he was liable to compensate the Government under the terms of his contract. The Executive Engineer had informed Saxena that the amount payable to the first respondent would be deducted from his bill and had on diverse occasions called upon Saxena to pay the amount due to the first respondent. The first respondent was concerned to receive the money due to him, and it was a matter of no consequence to him whether the Government paid it directly or the authorities got it paid by Saxena. The desire of the first respondent not to imperil his position as a contractor with the Government in P.W.D. contracts may well be understood. It is difficult to appreciate how this settlement made in the presence of the Executive Engineer, whereby Saxena agreed to discharge the liability of the Government, in consideration of discharge of his own liability under his contract, negatives the existence of the contract between the Government of Bihar and the first respondent.

There is on the record correspondence relating to the demands for payment by the first respondent. A letter 1 dated 28th March, 1956, was addressed by Saxena to the Executive Engineer informing him that M/s. Patna Flooring Company had not sent their bill to him and that they may be directed to furnish a copy of their bill to enable him to check the same and arrange payment. This letter refers to the payment for the work done after December, 1955, because the bill in respect of the work done in July, 1955, had already been submitted and was the subject-matter of the settlement of account Exhibit G. There are letters, dated 21st August, 1957, 7th December, 1957 and 8th March, 1958, in which the Executive Engineer called upon Saxena to settle the claim of M/s. Patna Flooring Company. There is draft of a letter of the Executive Engineer, dated 16th March, 1958, reciting that Saxena was requested several times to settle the claim amicably "but he was not in a mood to do so and wanted to drag the department into litigation." The second paragraph of that letter is important. It states:

"As a matter of fact when Shri Saxena failed to complete the particular item of work, M/s. Patna Flooring Company were engaged at the instance of the then Departmental Officer. Materials were also issued to them, the cost of which are still outstanding against them. And as such the department will have to pay the amount in question to M/s. Patna Flooring Company for the work done by them. It may be added here that the work done here by this time has already been billed for in favour of Shri G. P. Saxena. The correct procedure in this case would have been for the department to make payment to M/s. Patna Flooring Company."

By the last paragraph it is recorded that Saxena may be advised to settle the matter amicably and to obtain a clearance certificate from M/s. Patna Flooring Company. The Superintending Engineer also addressed a letter to Saxena on 26th May, 1958, calling upon him to settle the matter amicably with M/s. Patna Flooring Company within a month and threatening that the amount due will have to be deducted from his final bill. A copy of this letter was forwarded to M/s. Patna Flooring Company.

It appears that on 25th July, 1958, Saxena submitted a statement about the construction work done by him and included therein the work done by M/s. Patna Flooring Company. At the foot of the bill is a memorandum relating to payments made from time to time and the last item shown therein is Rs. 13,897

due to M/s Patna Flooring Company. Saxena not having paid the amount to M/s. Patna Flooring Company, a letter, dated 10th September, 1958, was addressed to Saxena by the Executive Engineer in which it was recorded that the contractor's (Saxena's) representative had seen the Executive Engineer in his office at the time of refund of the security deposit kept back on account of income tax dues and had promised that he would settle up the account with M/s Patna Flooring Company and pay their dues immediately, and that although the "refund of the amount had already been given the dues of M/s Patna Flooring Company had not been cleared" Saxena was once more requested to clear off the dues of M/s Patna Flooring Company so that the refund of the amount kept in deposit may be given to him.

This is all the material correspondence on which the first respondent has relied. The correspondence makes it abundantly clear that the primary liability for payment of the dues was of the State of Bihar and they accepted that liability. The Bill of M/s Patna Flooring Company was received by the P W D authorities and they called upon Saxena to satisfy the claim because under the terms of the contract the liability for payment would ultimately be enforced against Saxena. None of these letters even indirectly suggest that the contract for work done by M/s Patna Flooring Company in the matter of "mosaic flooring and dado works" was done in execution of the sub contract which that Company had obtained from Saxena. The anxiety evinced by the Superintending Engineer, the Executive Engineer and the Sub-Divisional Officer that the claim of M/s Patna Flooring Company be settled by payment through Saxena is consistent with the case that the primary liability was of the State of Bihar and the P W D authorities wanted to avoid litigation. The conduct of the authorities in the context of the documents to which we have already referred to is in our view consistent only with the inference that the construction work was done by M/s Patna Flooring Company under a contract directly with the P W D authorities.

Messrs. Patna Flooring Company were approved contractors and if they were made to believe that Saxena will be induced to pay the amount due to them, it was not expected that they would incur the displeasure of the authorities, by insisting upon payment directly by the State. The offer and acceptance, incorporated in Exhibit I G and I-C the construction work done by M/s Patna Flooring Company, thereafter the submission of the bills by M/s Patna Flooring Company for payment, the anxiety of the P W D authorities that payment should be made to M/s Patna Flooring Company and their intervention in securing payment and anxiety to avoid litigation clearly establish that the contract pursuant to which the work of "mosaic flooring and dado" was done was between M/s Patna Flooring Company and the Government directly. The contract was not unauthorised and therefore no question of rectification arises. It may also be noted that the contract required to be ratified and was not ratified was never raised in the trial Court or in the High Court.

The argument that after the contract was entered into, the Superintending Engineer had countermanded the arrangement is in our judgment without substance. On the letter, dated 16th May, 1958, there is an endorsement presumably by the Executive Engineer in which it is recorded that M/s Patna Flooring Company were engaged at the instance of the then Departmental Officers for completing the work left incomplete by Saxena, and it is followed by a query "Was the sanction of S E, S B C taken to this arrangement, if so, copies of the correspondence may please be furnished?" There is no record of the reply, if any, given to this query. There is however, at the foot of the letter an endorsement, dated 17th May, 1958, made by some one "write to the contractor". It is true that the Superintending Engineer was in overall charge of the construction work and by the terms of the tender itself the authority of the Executive Engineer to accept the tender is limited clause 9 of the form of tender Exhibit D. But there is

no evidence on the record that the Superintending Engineer had at any time countermanded the arrangement between the Executive Engineer and Messrs Patna Flooring Company. The first respondent in his examination before the trial Court stated that:

"I had sent Exhibit 1-G to S.D.O. P.W.D. No. 3 mentioning the rates and terms that my firm had with G.P. Saxena for construction of mosaic and dado work in Rajendra Surgical Block. No direct contract was ever entered with between P.W.D. department and my firm even after this letter Exhibit 1-G. Saxena went to Superintending Engineer and objected. The Superintending Engineer ordered that Saxena will continue to be the contractor as before and no direct contract will be given to any firm."

But it is not suggested that there was any such arrangement in the presence of the first respondent. The Superintending Engineer has not been examined, and there is on the record no evidence to support this part of the case, which was never set up in the trial Court and the High Court.

The admissions made by the first respondent in his notice and the plaint in suit No. 53 of 1959 were sought to be explained by him on the plea that he had signed the plaint and the verification without reading the plaint of the suit as the plaint was required to be filed in great hurry. A similar explanation was also given in respect of the contents of the notice. It is difficult to accept this explanation which was invented with a view to get out of the inconvenient admissions. The Executive Engineer, Mukteshwar Prasad, in his evidence stated that the Sub-Divisional Officer had given a warning to Saxena that his contract would be terminated and a part of the work would be done through another agency and that thereafter Messrs. Patna Flooring Company were engaged to complete the work. Rameshwar Prasad Singh, who succeeded Mukteshwar Prasad as the Executive Engineer also said that the unexecuted part of the mosaic work was taken away from Saxena and was entrusted directly to Messrs. Patna Flooring Company and that Messrs. Patna Flooring Company were directed to complete the work. It was never suggested to either of these witnesses that the arrangement was countermanded by the Superintending Engineer.

The first respondent approached the Court denying that there was a contract between him and the State of Bihar relating to the construction work. That denial is falsified by letters Exhibits 1-G and 1-C and is further falsified by his statements made by him on oath in his plaint. On his own admissions, the first respondent is a person who is willing to trim his sails as his interest demands. The explanation given by the first respondent regarding the admissions made by him in the plaint cannot be accepted as truthful. On a careful consideration of all the circumstances, we are unable to agree with the High Court that there was no contract between the first respondent and the P.W.D. authorities representing the State of Bihar in respect of the "mosaic and dado work" by Exhibits 1-G and 1-C pursuant to which the first respondent carried out the work independently of Saxena.

It now remains to consider whether there was a subsisting contract at the date of filing of the nomination paper. The work of construction entrusted to the first respondent was completed in July, 1955, and in respect of "bath rooms and the lecture theatre" was completed sometime before April, 1956. The first respondent has not been paid the amounts due to him. It cannot be said that in view of the attitude adopted by the State of Bihar there has been a breach of the contract. The expression "there subsists a contract" in section 7 (d) of the Act includes cases in which one party has performed his part of the contract and that part performable by the other party remains. It was so held by this Court in *Chaturbhuj Jasani's case*.<sup>1</sup> The first paragraph of the head-note in that case states:

"A contract for the supply of goods does not terminate when the goods are supplied, it continues into being till payment is made and the contract is fully discharged by performance on both sides."

1. (1954) S.C.J. 315; (1954) S C R. 317.

In that case pursuant to an oral request made on behalf of the State of Madhya Pradesh, Chaturbhuj Jasani had supplied "canteen stores" between 8th October, 1951 to 23rd January, 1952 and had submitted invoices in respect thereof. Payments were made in respect of those invoices between 15th November, 1951 and 20th March, 1952. Elections to the Parliament were held in December, 1951 and Jasani stood as a candidate for one of the two seats before payment for the stores supplied was made. The Court refused to accept the plea raised on behalf of the elected candidate that the moment the contract is fully executed by the candidate, the contract is at an end and a new relationship of debtor and creditor takes its place. It is true that the material words of section 7 (d) of the Act which fell to be considered in that case were somewhat different. They stood as follows:

"A person shall be disqualified for being chosen as and for being, a member of either House of Parliament or of the Legislative Assembly or Legislative Council of a State....."

(d) If, whether by himself or by any person or body of persons in trust for him or for his benefit or on his account, he has any share or interest in a contract for the supply of goods to, or for the execution of any works or the performance of any services undertaken by the appropriate Government".

The conditions under which disqualification was incurred were wider under the section as it then stood. Any share or interest in a contract for the supply of goods, or for the execution of any works or the performance of any services undertaken whether by himself or any person or body of persons in trust for him or for his benefit or on his account, disqualified a candidate from being elected as a member of the Legislature. The Act as amended has now restricted the conditions which import a disqualification. The two conditions now are that the contract must be in the course of the candidate's trade or business, and it must be for supply of goods or for execution of any works undertaken by the Government. Contracts in respect of services undertaken for the appropriate Government are apparently not within section 7 (d) as amended. The amended section again requires that there must be a contract entered into by the candidate. Mere interest in a contract, unless the candidate has entered into the contract directly or through an agent, would apparently not disqualify him. But section 7 (d) before it was amended was attracted, if there was a subsisting contract and the application of the clause after it was amended also is subject to the same condition. If there was no subsisting contract, neither under section 7 (d) before it was amended, nor after it is amended, would the disqualification be incurred. In the present case the first respondent performed his part of the contract, and no payment has been made by the Government of Bihar to him. In the circumstances, relying upon *Chaturbhuj Jasani's case*<sup>1</sup>, we are of the view that the contract was a subsisting contract.

Mr. Sarju Prasad appearing on behalf of the first respondent contended that by section 116-B of the Act, the decision of the High Court is made "final and conclusive" and interference by this Court with that decision, even if it appears that an error has been committed by the High Court, will not be justified. But by section 116-B the jurisdiction conferred upon this Court by Articles 133 and 136 of the Constitution is not, and cannot be restricted. If the circumstances of the case justify, this Court has the power, and is indeed under a duty, to set aside the verdict of the High Court. The Court is dealing with a case in which a question which vitally concerns the purity of elections arises. A person who has a contractual relationship between him and the executive would, on getting elected, be able to bring pressure to bear upon the executive to settle his claim or to secure advantage for himself to which he may not be lawfully entitled. This appears to be the scheme underlying section 7 (d) which disqualifies a person from being chosen as a member of the Legislature if there subsists a contract entered into in the course of his trade or business by him with the appropriate

1. (1954) S.C.J. 315 : (1954) S.C.R. 817.

Government for the supply of goods or for execution of any works. If, on the evidence, subsistence of the contract which disqualifies a candidate is established, this Court would not be justified in refusing to give effect to its conclusion especially when the question vitally concerns the public in keeping out of the Legislature persons who have claims arising out of subsisting contracts against the Government.

In our view the appeal ought therefore be allowed, and the order passed by the High Court set aside and the order of the Election Tribunal restored with costs in this Court and the High Court.

**ORDER OF THE COURT:**—In accordance with the opinion of the majority the appeal is dismissed with costs.

V.K.

*Appeal dismissed.*

**THE SUPREME COURT OF INDIA.**  
(Civil Appellate Jurisdiction.)

PRESENT:—A. K. SARKAR, RAGHUBAR DAYAL AND V. RAMASWAMI, JJ.

Thiruvallanchuli Vaithilingam Pillai Charities

.. Appellants\*

v.

Vijayavalli Achi and others

.. Respondents.

*Civil Procedure Code (V of 1908), section 11—Res judicata—Deed of partition between adoptive father and adopted son—Allotment of properties to adopted son and retention of some lands by adoptive father and mother for life—Vested interest to adopted son—Death of adoptive father—Suit against adoptive mother by adopted son claiming possession of entire properties—Defence of right to possession of entire properties by mother—Decision that half the properties to go to adopted son and half to be retained by mother for life—Stray sentence in the judgment that half-share of mother on her death would go to her representatives—If would constitute res judicata—Suit for possession by purchaser of the vested interest of the adopted son for the half-share held by the adoptive mother—Decision on a point not necessary for the purpose of the prior suit—Not to constitute res judicata.*

Under a deed of partition, the adoptive father allotted substantial properties to his adopted son and retained 100 acres of land for himself and the maintenance of his wife with a vested interest for the adopted son. After the death of the adoptive father, the adopted son filed a suit against the adoptive mother claiming possession of the entire 100 acres. Overruling the defence of the mother that she was entitled to be in possession of the entire 100 acres, the Court on a construction of the deed of partition held that she was entitled only to 50 acres for her life and the other 50 acres would go to the adopted son. In the judgment of the trial Court occurred a stray sentence that the share of the mother after her death would go to her representatives. In connection with the management and possession of certain trust properties, held by the adopted son, on a suit filed by the trustees an instalment decree had been passed against the adopted son and in execution of the decree that had created a charge on the vested interest of the adopted son in 50 acres held by the mother, the fifty acres were sold and purchased by the trust. After the death of the adopted son and mother, in the subsequent suit filed by the trust for the recovery of the 50 acres from the representatives of the adopted son, a plea of *res judicata* in defence was raised on the basis of the stray sentence of the Court in the prior suit that the 50 acres would go to her representatives.

*Held*, the subsequent suit for recovery of possession was not barred by *res judicata*. A decision would operate as *res judicata* if it was necessary for the purpose of the case in which it had been given.



The question in the prior suit was whether the adopted son is entitled to get possession of the entire 100 acres on the death of the adoptive father and similarly whether the adoptive mother was entitled to retain possession of the entire 100 acres for her life. On the construction of the deed of partition that the allotment of the properties had been validly made the Court decided that the adopted son was entitled to 50 acres only and that the other 50 acres would be held by the adoptive mother for her life. It was not necessary for the Court for the decision of any of the disputes that arose in that suit to say to whom the lands that went to adoptive mother would go on her death as that question would depend upon the terms of the deed. Therefore the *res judicata* sentence in the prior judgment would not operate as *res judicata*.

On the true interpretation of the deed of partition also the Court in the prior suit had proceeded on the basis that the adopted son was the person who was entitled to the properties after the death of the adoptive mother. The word "representative" has been used only to describe the adopted son.

Appeal against the Judgment and Decree of the High Court of Madras in A S No 221 of 1956, reversing the Judgment of the Court of Subordinate Judge, Kumbakonam in O S No 33 of 1955.

*A V Viswanatha Sastri and R Ganapathi Ayyar*, Advocates, for Appellants.  
*R N Agarwala*, Advocate and *Messrs Dadachanj & Co*, for Respondents.

The Judgment of the Court was delivered by

*Sarkar, J*.—The only question argued in this appeal is whether the appellants' suit for possession of certain lands is barred by *res judicata*. The trial Court held that it was not barred, but on appeal the High Court of Madras took a contrary view. Though the question involved is only one, the case has a long history which has to be set out in some detail.

The appellants are the trustees of a trust created in 1891 by one Vaithilingam Pillai who appears to have possessed substantial properties. On 10th September, 1891, the day after the trust had been created, Vaithilinga who was—childless, adopted one Kalyanasundaram as his son. An agreement relating to the adoption, appears then to have been entered into by Vaithilinga and Chidambaram Pillai, the natural father of Kalyanasundaram then a minor, on the latter's behalf. Thereafter on 12th September, 1891, a deed of partition was executed by Vaithilinga and Chidambaram, as the guardian of Kalyanasundaram appointed under an instrument executed in the meantime by the Vaithilinga as the adoptive father of Kalyanasundaram. Under this deed, the larger part of the properties left with Vaithilinga after the creation of the trust which were considerable went to Kalyanasundaram and about 100 acres were retained by Vaithilinga for the maintenance of himself and his junior wife Kamakshi. Vaithilinga had another wife from whom he had been separated for a long time and with her we are not concerned. It will be necessary to return to that part of the deed under which, the 100 acres were retained by Vaithilinga later. On 15th June, 1904, Vaithilinga died. Both Kamakshi and Kalyanasundaram survived him. Soon thereafter viz., on 21st September, 1904, Kalyanasundaram who had then attained majority filed a suit being O S No 54 of 1904 against Kamakshi and another person with whom we are not concerned, claiming possession of the 100 acres of land which had been left with Vaithilinga under the partition deed as earlier stated, after setting apart about 20 acres for Kamakshi's maintenance. Kamakshi's defence in the suit appears to have been that under the deed she was entitled to be in possession of the entire 100 acres for her life after the death of her husband. The Subordinate Judge of Kumbakonam in whose Court the suit had been filed held that Kamakshi was entitled to retain for her life 50 acres out of the 100 acres of land in dispute and that the other 50 acres should go to Kalyanasundaram on Vaithilinga's death. The learned Subordinate Judge directed a partition of the land equally between Kalyanasundaram and Kamakshi. Kamakshi filed an appeal against this

judgment and Kalyanasundaram a cross-objection. Both these were however dismissed. The decree of the learned Subordinate Judge having thus been confirmed, the lands were partitioned and possession of a half share thereof was delivered to Kalyanasundaram. The remaining 50 acres were left in the possession of Kamakshi. The dispute in the present case concerns the lands that came to Kamakshi's share under the decree of the learned Subordinate Judge. The judgment in Suit No. 54 of 1904 was delivered on 7th July, 1905, and it is this judgment which is said to operate as *res judicata* barring the present suit.

We pass on now to the facts concerning the appellants' claim. It appears that certain proceedings took place, the exact nature of which does not appear from the records, for framing a scheme in respect of the trust created by Vaithilinga. Presumably prior to these proceedings first Vaithilinga and after him Kalyanasundaram had been acting as trustees of the trust and had been in possession of the trust properties. It will have been noticed that the trust properties were quite separate from the 100 acres with which Suit No. 54 of 1904 was concerned. On 28th August, 1923, by a decree passed in the proceedings earlier referred to, a scheme for the management of the trust was framed. The appellants are the present trustees under the scheme. On 2nd April, 1928, a decree for Rs. 30,000 was passed in the same proceedings in favour of the trustees and against Kalyanasundaram. This perhaps was in respect of a claim by the trustees against Kalyanasundaram for mesne profits. The decree last mentioned created a charge on some of Kalyanasundaram's properties for the due repayment of the decreed amount. It also provided that the amount would be payable in certain specified instalments. The decretal sum not having been paid, the trustees put up certain properties of Kalyanasundaram to Court sale in execution of the decree. The sale actually took place on 2nd April, 1931 and it was confirmed on 7th April, 1933. Lot No. 3 of the properties sold was described as the lands which were being enjoyed by Kamakshi for her life and in which Kalyanasundaram had a vested interest. These were the 50 acres of which Kamakshi had been hold entitled to be in possession for her life under the decree in Suit No. 54 of 1904. The sale certificate stated that the sale was subject to the rights of Kamakshi to enjoy the properties in lot No. 3 for her life. Symbolical delivery of possession of the 50 acres of land comprised in lot No. 3 of the sale certificate as mentioned earlier was given to the trustees on 12th February, 1935. The lands however continued in the possession of Kamakshi as indisputably she was entitled to be in possession for her life. What had been sold was Kalyanasundaram's vested interest in the 50 acres. Kalyanasundaram died sometime in 1950 and Kamakshi on 30th November, 1954. On 24th June, 1955, the then trustees filed the present suit against Kalyanasundaram's widow and daughter and certain other persons for possession of the 50 acres of land which had been in Kamakshi's possession till her death and also for mesne profits, basing their claim on the purchase by them of Kalyanasundaram's vested interest in them which had fallen into possession on Kamakshi's death. The only defence to this claim made in the High Court and in this Court is that the Subordinate Judge in his judgment in Suit No. 54 of 1904 had held that on Kamakshi's death the 50 acres in her possession would go to her representatives and that this judgment operated as a bar to the present suit. Besides, this defence other defences were raised in the trial Court but they were not pressed in the High Court or in this Court.

The partition deed so far as material is in these terms: "The lands 15 velis, 3 mahs, 60 cents shall remain in the enjoyment of Vaithilingam Pillai for the livelihood of the said Vaithilingam Pillai as well as his junior wife Kamakshi. After the lifetime of Vaithilingam Pillai and Kamakshi these lands shall fall to the enjoyment of Kalyanasundaram Pillai." We are not concerned with the rest of the deed and all references in this judgment to the deed will be understood as a reference to this part of it only. The 15 Velis, 3 mahs and 60 cents of land, which in English measure would

come roughly 10 100 acres were the lands which were the subject matter of Suit No. 54 of 1904. It is not disputed that on proper interpretation, under the deed, Kalyanasundaram acquired a vested interest in these 100 acres. The only question is whether notwithstanding the correct interpretation of the deed, the judgment in Suit No. 54 of 1904 operates as *res judicata*. To put it more precisely: Did that judgment hold that Kalyanasundaram did not have a vested interest in the lands and if it did, was that finding necessary for the decision of the suit?

Now, Kalyanasundaram had based his claim in Suit No. 54 of 1904 to the entirety of the 100 acres substantially on the ground that his guardian had no power to enter into a deed of partition on 12th September, 1891, as by the deed of adoption earlier executed by Vaithilinga, he had become the sole owner of all of Vaithilinga's properties. It is unnecessary to discuss the judgment of the learned Subordinate Judge as a whole in detail and it would suffice for our purpose to state that he rejected Kalyanasundaram's claim in substance holding that the adoption agreement, the deed of appointment of Chidambaram as guardian of Kalyanasundaram, and the deed of partition had to be considered all together. And Kalyanasundaram was not entitled to ignore the deed of partition and recover the properties entirely on the basis of the adoption agreement. The learned Subordinate Judge observed 'even granting for arguments sake that Exhibit D (the deed of partition) was a deed of maintenance in favour of Vaithilinga and the first defendant (Kamakshi) as contended by the Pleader for the plaintiff (Kalyanasundaram) I do not consider that the arrangement evidenced by it is improper or beyond the powers of the plaintiff's guardian. By Exhibit D about 55 velis of land were absolutely given to the plaintiff and the life interest in about 15 velis of land was reserved in favour of Vaithilinga and his wife, i.e. about 4 5th of the family properties was given to the plaintiff and the life interest in the remaining 5th share was taken by those who had gratuitously made him their adopted son and given to him the bulk of the property. They reserved to themselves, no right of alienation or disposition over the abovementioned 5th share and declared that it should descend to plaintiff after their deaths. Therefore, I do not consider the plaintiff can on any ground succeed in setting aside the arrangement evidenced by Exhibit D.' The portions in brackets in the above quotation have been added by us.

Having thus rejected Kalyanasundaram's claim to the entirety of the 100 acres, the learned Subordinate Judge proceeded to consider Kamakshi's claim to all the 100 acres on Vaithilinga's death for her life. He thought that Kamakshi's claim could be upheld only if it could be said that under the deed she and Vaithilinga had been made joint tenants of the 100 acres. After referring to certain authorities on the point, he observed "Where the intention was declared in equally strong words, it was decided that the estate taken was not joint in the sense in which it is enjoyed by undivided co-parceners and it was only an estate held by tenants-in-common. Therefore, when one of the tenants died, his share in the estate naturally descended to his legal representative, that is, to the plaintiff, unless there is something express in the terms of Exhibit D to show that the whole estate should be enjoyed by the first defendant during her lifetime. Such express declaration is wanting in Exhibit D. The recital that plaintiff should possess the estate after Vaithilinga and first defendant, can be construed when the estate is only that of tenants-in-common (as meaning) that the share of Vaithilinga should go to his legal representative after his death and that the share of first defendant should go after her death to her representative. The words 'as meaning' (have been added by us) as they seem to have been omitted in the judgment. The parties agree that without these words the meaning is not clear. In the view that he had thus taken, the learned Subordinate Judge rejected Kamakshi's claim to succeed on the death of Vaithilinga as the joint tenant. To the entirety of 100 acres of land and held that Kalyanasundaram was entitled to half of it. Pursuant to this

decision, the partition to which we have earlier referred, was made. We would here remind that an appeal and a cross-objection against this judgment was rejected.

The learned Counsel for the respondents relies on the words "the share of the 1st defendant should go after her death to her representative" in the judgment of the learned Subordinate Judge which we have earlier quoted and contends that they decide that the Subordinate Judge on an interpretation of the deed of partition held that on Kamakshi's death, her share would go to her representative. It was said, that it had, therefore, been held by him that Kalyanasundaram had no vested interest in the 50 acres of which Kamakshi was held to be entitled to continue in possession. We should suppose that if such was the interpretation of the deed by the learned Subordinate Judge, his judgment might operate as *res judicata* barring the claim of the appellants in the present suit for the claim through Kalyanasundaram who was a party to the earlier suit. The question appears to us to be whether this sentence in this judgment amounts to a decision operating as *res judicata*. It is unnecessary to refer to the decision on the point of *res judicata*; it is enough to say that a decision can operate as *res judicata* if it was necessary for the purpose of the case in which it had been given. There is no dispute between the parties on this point.

Now, it seems to us perfectly clear that no question arose in Suit No. 54 of 1904 as to the person who would succeed after her death to any property that might come to Kamakshi under a decree made in it. It was not necessary for the learned Subordinate Judge for the decision of any of the disputes that arose in that suit to say to whom the lands that went to Kamakshi would go on her death. It would, therefore, appear that the sentence in the judgment in Suit No. 54 of 1904 on which the learned Counsel for the respondents relied could not operate as *res judicata* barring the present suit.

There are however other reasons supporting that view. In an earlier part of his judgment which we have already quoted, the learned Subordinate Judge held that by the deed, it was declared that the entire 100 acres "should descend to the plaintiff after their deaths", i.e. those lands will go to Kalyanasundaram after the death of Vaithilinga and Kamakshi. This was really his interpretation of the deed so far as the devolution of the lands was concerned; it would be legitimate to suppose that the learned Subordinate Judge did not intend to contradict himself interpreting the same words in the deed in a different way by using the sentence that the share of the 1st defendant should go after her death to her representative. It has to be remembered that at the date of the judgment Kalyanasundaram was the legal representative of both Vaithilinga and Kamakshi. It seems to us, therefore, to be a natural interpretation of the sentence in the judgment on which the respondents rely to hold that the word "representative" had been used really as indicating Kalyanasundaram. We should also point out that in the earlier part of the judgment as also in the part on which, the respondents relied it was held that Vaithilinga and Kamakshi had by the deed been given only a life interest in the lands. It would not be a natural interpretation of the learned Judge's judgment, to hold that having decided that under the deed Vaithilinga and Kamakshi held lands only for their lives he proceeded to decide that at their deaths, the lands would go to their respective representatives. The question was of the rights under the deed and if under the deed Vaithilinga and Kamakshi had only life interest in the lands, their ultimate destination had to be decided by the terms of the deed if it made any provision in that behalf which it did. Admittedly under the deed the lands were to go to Kalyanasundaram after the death of Vaithilinga and Kamakshi. The learned Subordinate Judge was not deciding any question of intestate succession to the lands on the death of these two.

It also seems to us that in the portion of the judgment on which the respondents rely the learned Subordinate Judge only dealt with the question whether Kalyanasundaram who had been held not to be entitled to the entirety of the 100 acres was entitled to any portion of the lands. The real point in that

connection, according to the learned Subordinate Judge was whether the deed has made Vaithilinga and Kamakshi joint tenants in respect of the 100 acres or tenants in common because it was only in the latter event that Kalyanasundaram might claim a half share in the lands on Vaithilinga's death. Having held that the words of grant in the deed read by themselves created a tenancy in common in the lands in favour of Vaithilinga and Kamakshi, he proceeded to consider whether the words provide for the lands going to Kalyanasundaram on the deaths of Vaithilinga and Kamakshi it should lead to a different interpretation of the words of grant and held that they were not clear enough to do so. Having thus decided that Vaithilinga had a half share in the lands as a tenant in common with Kamakshi, he proceeded to consider whether the provision in the deed that Kalyanasundaram would get the lands after the life time of Vaithilinga and Kamakshi could be interpreted to mean that though the lands were held as tenants in common by Vaithilinga and Kamakshi, Kalyanasundaram was not entitled to any part of the land till after the death of both of them and that till then, Kamakshi was entitled to them as she claimed. He answered the question in the negative and it was in that connection only that he said the proper interpretation of these words was that the share of Vaithilinga in the lands was given to his representative after his death and the share of Kamakshi to her representative after her death. He was only deciding that the words meant that on the death of each his or her share would devolve as provided in the deed and not pass to the persons who survived. On this basis he held that Kalyanasundaram was entitled on Vaithilinga's death to the 50 acres which the latter held for his life. Kalyanasundaram did not claim as the legal representative of Vaithilinga but as the person named in the deed. He of course was Vaithilinga's legal representative and obviously that is why the learned Subordinate Judge used these words to describe him. We are unable to hold that he was interpreting the deed as meaning that the share each of Vaithilinga and Kamakshi in the lands would go on their respective deaths to their legal representatives whoever they might be at the time. That was not a question that arose or he was asked to decide. We are therefore of the view that there is nothing in the judgment in Suit No 54 of 1904 to operate as barring this suit by way of *res judicata*. It is of some interest to point out that the sale in execution, on which the trustees-plaintiffs now represented by the appellants before us based their claim was expressly of Kalyanasundaram's vested interest under the deed in the lands which were then in Kamakshi's possession under the decree in Suit No 54 of 1904. The trustees in that application for execution had alleged that Kalyanasundaram had such vested interest. The order directing the sale held that he had such a vested interest. The certificate of sale mentioned that Kalyanasundaram had a vested right in these lands. That would appear to be a decision binding on the respondents as Kalyanasundaram's heir.

The learned Counsel for the respondents stated that if we found ourselves in agreement with the appellant's contention, we should refer the case back to the High Court for the decision of various other points that arose in it. This contention seems to us to be wholly unfounded. It is clear from the judgment of the High Court under appeal that before that Court the respondents confined their argument only to the question of *res judicata*. Besides this aspect of the matter the learned Counsel for the respondents was also unable to refer us to any point of any substance which could have been argued with plausibility in the High Court in support of the respondents' case and was not argued. We find no reason to refer the case back to the High Court for decision of any outstanding point. We are clear that no other point remains to be decided.

In the result we allow the appeal set aside the judgment of the High Court and restore that of the learned trial Judge. The appellant will get the costs of the proceedings in the High Court and in this Court.

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## CONTENTS

	PAGES.
Journal .. .. .	11—34
Reports .. .. .	265—400

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## CORRECTION

In (1966) 2 S C J at page 293, in the footnote,  
*For* '7th December, 1965'  
*Read* '7th October, 1965'

In page 359 of (1966), S C J, 7th line from bottom,  
*For*, 'Sikri' J (for himself, Subba Rao, Wanchoo and Ramaswami, JJ.).  
*Read* 'Sikri, J (for himself, Subba Rao and Wanchoo, JJ.)'

	PAGES
Interpretation—Statute—Tax Ordinance—Explanation aided by first amendment—Second amendment—Insertion of a comma between words in the Explanation and enacting comma would be deemed to be a way therefrom the date of Tax Ordinance—Intention to render the explanation also retrospective, clear	397
Motor Vehicles Act (IV of 1939) sections 58 and 63 and C P and Perar Motor Vehicles Rules, 1940 rules 61, 62 and 63—Scope—Inter regional permits renewal of—Renewal of counter signature for a different region—Authority competent to make—Word 'may' in rule 63 (a)	351
Mysore University Act (XXIII of 1956), sections 22, 23 and 43—Powers of Academic Council under—If includes power to make a regulation that no candidate who fails four times shall be permitted to continue the Bachelor of Veterinary Science Course	306
Mysore Village Offices Abolition Act (XIV of 1961)—Constitutional validity—Act if void as colourable legislation	329
Penal Code (XLA of 1860) sect on 81 and Evidence Act (I of 1872), section 103—Illustration (a)—Scope—Defence of insanity—Onus	281
Practice—Single Judge considering earlier decision require reconsideration—Proper procedure	295
Provincial Insolvency Act (V of 1920) sections 6, 7 and 23—Debtor's property sold in execution of money decree—Sale set aside under Order 21 rule 89, Civil Procedure Code—Act of insolvency if wiped out—If sufficient cause for refusal to adjudicate under section 23	350
Registration Act (XXI of 1908), section 17—Award—When requires registration	285
Supreme Court Rules (1950) Order 16 rule 14 A—Scope—Civil Procedure Code (V of 1908), Order 22—Appeal against preliminary decree—Death of respondent—Legal representative impleaded in final decree proceedings—If saves appeals from abatement	302
Transfer of Property Act (IV of 1882) section 51—Compensation for improvements—Cannot be claimed by person effecting improvements on property knowing that he has no right to such property	310
Tribunals dealing with rights of citizens—It bound to adopt judicial approach	295
Uttar Pradesh (Temporary) Control of Rent and Eviction Act (III of 1947), section 7 F—Revisional jurisdiction of State Government—If quasi judicial—Order made without bearing opposite parties—If bad as opposed to principles of natural justice	293

# CUMULATIVE TABLE OF CASES REPORTED.

## PARTS 1—3

	PAGE
Ajoy Kumar Mukherjee v. Local Board of Barpeta.	153
M. A. Akbar Kashani v. United Arab Republic ..	25
Anowar Hussain v. Ajoy Kumar Mukherjee ..	1
S. Banerjee v. S. Agarwala ..	111
Bhaiya Lal v. Harikishan Singh ..	77
Bharat Singh v. Bhagirathi ..	53
Bhikari v. State of U.P. ..	281
Biram Prakash v. Narendra Dass ..	220
Bishambhar Nath Kohli v. State of Uttar Pradesh ..	337
Brundaban Nayak v. Election Commission of India ..	166
Bundelkhand Motor Transp. Co. v. Behari Lal Chaurasia ..	37
Chattanatha Karayalar v. Central Bank of India, Ltd. ..	317
Cochin State Power & Light Corpn. v. State of Kerala ..	204
Dwarka Nath v. Lal Chand ..	95
General Assurance Society Ltd. v. Chandumull Jain ..	101
Gulab Bai v. Puniya ..	265
P. C. Gulati v. Lajya Ram ..	42
Gurbinder Singh v. Lal Singh ..	157
Gurcharan Das Chadha v. State of Rajasthan ..	139
Harinagar Sugar Mills Co. v. M. W. Pradhan ..	126
N. S. Z. Hossain Mirza v. Satyendra Nath Bose ..	208
Indian Chemical Products, Ltd. v. State of Orissa ..	393
Kaluram Onkarmal v. Baidyanath Gorain ..	145
Kalyani Stores v. State of Orissa ..	367
Kamal Narain Sarma v. Dwarka Prasad Mishra ..	34
Kehar Singh v. Dewan Singh ..	363
Kishanchand Lunidasing Bajaj v. C.I.T., Bangalore ..	20
Lala Shri Bhagwan v. Shri Ram Chand ..	295
Laliteshwar Prasad v. Bateshwar Prasad ..	241
Maddanappa v. Chandramma ..	310
Malludora v. Seetharatnam ..	350
Mohammed Meera Lebbai v. Tirumalaya Gounder ..	50
Mongibai Hariram v. State of Maharashtra ..	379
Morvi Mercantile Bank Ltd. v. Union of India ..	6
Nand Kishore Saraf v. State of Rajasthan ..	194
Nawab Usmanali Khan v. Sagar Mal ..	285
S. D. G. Pandarasannadhi v. State of Madras ..	81
Punjab Sikh Regular Motor Service v. R.T. Authority ..	354
Raja Gopala Rao v. Sitharamamma ..	179
Ratanlal v. State of Maharashtra ..	133
Md. Reza Debstani v. State of Bombay ..	334
M. R. Ruparel v. State of Maharashtra ..	87
Sahoo v. State of U.P. ..	172
Sales Tax Officer v. M/s. Shiv Ratta G. Mohatta..	161
Shankaranarayana v. State of Mysore ..	329
R. K. Shankar Jagtap v. S. B. Sakharam Jedhe ..	302
South Asia Industries (P.), Ltd. v. Sarup Singh ..	69
State of Bombay v. Jagmohandas ..	359
State of Bombay v. Nurul Latif Khan ..	184
State of Madras v. Govindarajulu Naidu ..	213
State of Madras v. Kunnakudi Melamatam ..	175

	PAGES
State of M.P. v V. P. Sharma	231
State of U.P. v R. Sharma Vaidya	200
State of U.P. v Srinarayan	190
State of W.B. v Nripendra Nath Bagchi	59
Tek Bahadur Bhujl v Debi Singh Bhujl	290
K. H. Thacker v, M/s The Saran Engineering Co., Ltd	196
Union of India v Sukumar Pyne	227
University of Mysore v Gopala Gowda	306
Vaithilingam Pillai Charities v Vijayavalli Achi	259
Venkatesh Narahar Katti v H. K. Mulla	346
Venkateswara Rao v Government of A.P	270
Vijay Singh v State of Maharashtra	325
War Profits tax Commr v M/s. B. Balchand	397

# CUMULATIVE INDEX OF REPORTS.

## PARTS 1-3

	PAGES.
Administration of Evacuee Property Act (XXXI of 1950) (as amended by Act I of 1960), sections 27 and 58 (3)—Declaration by Deputy Custodian, Lucknow, as evacuee property under Ordinance XII of 1949—Acquisition of that property by Central Government under Act XLIV of 1954—Sale by auction and purchase by R.C.K. in 1957—Revision petition in 1961 by U.P. State to Custodian-General against the order declaring the property as evacuee property in 1949—Maintainability—Exercise of revisional powers in his discretion—Jurisdiction of Supreme Court to interfere in appeal—Additional evidence of copies of evidence—Inconsistent with judicial procedure and Rules of natural justice—Displaced Persons (Compensation and Rehabilitation) Act (XLIV of 1954), section 12 ..	337
Andhra Pradesh Panchayat Samithis and Zilla Parishads Act (XXXV of 1959), sections 62 and 72—Powers of Government under—Orders under not legally passed—Powers of High Court to issue writ quashing the latter illegal order ..	270
Arbitration Act (X of 1940)—Award stating that the existing documents relating to debts obtained on lands would remain as before and remain as securities till repayment—If requires registration under—Registration Act (XVI of 1908), section 17 .. .. .	285
Assam Local Self Government Act (XXV of 1953), section 62—Levy of Annual tax by Local Boards for use of any land for the purpose of holding markets—Constitutionality—Constitution of India (1950), Article 14—If violated.. ..	153
Bihar Land Reforms Act (XXX of 1950), section 14—Claim by mortgagee—Limitation—Considerations .. .. .	208
Bihar and Orissa Excise Act (II of 1915), section 27—Notification under, dated 31st March, 1961—Levy of duty (countervailing) on foreign liquor imported from other States—No manufacture of foreign liquor in the State—Validity—Constitution of India (1950), Articles 301, 304, 305, 366 (10) and 372 .. ..	367
Bombay Land Requisition Act (XXXIII of 1948), sections 4 (3) and 6—Bombay Rents, Hotels and Lodging Houses Act (LVII of 1947), sections 13 (1) (g) and 17—Person evicted in execution of a decree for ejectment under the Act of 1947—Requisition of the same premises under the Act of 1948—Allotment to the evicted Person—Legality .. .. .	379
Bombay Prohibition Act (XXV of 1949), as amended by Bombay Act (XII of 1959), sections 24-A (2), 66 (1) (b), 66 (2) and 85 (1) (1)—Consuming liquor contained in a medicinal preparation—When not punishable under section 66 (1) (b)—Burden of proof .. .. .	324
—sections 6-A (as amended by Act XXII of 1960), 24-A and 59-A—Medicinal preparations ( <i>Mahadrasasava</i> and <i>Dashmoalarishta</i> alcohol content above 50 per cent. by volume)—Manufacture by distillation process by a licensed person and issue from a bonded warehouse—Possession (on 14th September, 1960), if offends the statute—Exemption under section 24-A(2)—Applicability—Subsequent declaration (on 4th October, 1960) under section 6-A if effective .. .. .	133
Bombay Sales Tax Act (V of 1946), sections 13 and 20 (Bombay Sales Tax Act (XXIV of 1952), sections 19 and 29)—Advance tax paid by a registered dealer—Provision void under Article 286 (1) (a) of the Constitution (1950)—Discovered as void in 1952—Suit for refund of tax paid—Mistake of law—If barred—Limitation Act (IX of 1908), Article 96 .. .. .	359
Bombay Tenancy and Agricultural Lands Act (LVII of 1948), sections 14 (1) and 29 (2)—Default in payment of rent—Notice of termination of tenancy—Application for an order for possession—Starting point of limitation of two years .. ..	346
Civil Procedure Code (V of 1908), section 11— <i>Res judicata</i> —Deed of partition between adoptive father and adopted son—Allotment of properties to adopted son and retention of some lands by adoptive father and mother for life—Vested interest to adopted son—Death of adoptive father—Suit against adoptive mother by adopted son claiming possession of entire properties—Defence of right to possession of entire properties by mother—Decision that half the properties to go to adopted son and half to be retained by mother for life—Stray sentence in the judgment that half-share of mother on her death would go to her representatives—If would constitute <i>res judicata</i> —Suit for possession by purchaser of the vested interest of the adopted son for the half-share held by the adoptive mother—	

Decision on a point not necessary for the purpose of the prior suit—Not to constitute <i>res judicata</i>	259
—section 60 (1) (g)—Political pension—If includes privy purse given to ex Ruler	285
—section 86 (1)—Applicability—Suit against foreign State with republican form of Government—Consent of Central Government—Essential—International Law	25
—Foreign State—Immunity from being sued in Municipal Courts	
—sections 86 (1) and 87 B—Consent of Central Government—If necessary for proceedings against ex Ruler under section 14 of the Arbitration Act (X of 1940)	285
—section 99 and Order 20 rule 12—Suit by plaintiff—Decree in favour of one of the defendants and against the other defendants—Interference by appellate Court on ground that a decree cannot be passed in favour of a defendant who has not asked for transposition as plaintiff—Bar of section 99—Applicability—Award of mesne profits to a person who has not asked for the same—Legality	310
Companies Act (VII of 1913) section 38 and Regulations in Table 'A', First Schedule—Rectification of share register—Transmission by operation of law—'Transfer' and 'Transmission', distinction—Discretion of directors to refuse recognition of transfer—Powers of Court to control	393
Companies Act (I of 1956), sections 433 (e) 434 (1) (a) and 439 (1) (b)—Civil Procedure Code (V of 1908), Order 40 Rule 1—Petition for winding up of a company—Company indebted to a joint Hindu family—Receiver appointed by Court in a suit for partition of the properties of the joint family—Empowered to take necessary proceedings to realise the properties and debts due to the family—If can file a petition for winding up—Statutory notice to pay the debt to Assistant Collector Bombay, in discharge of income-tax due by the family—If proper and sufficient—Non compliance amounts to 'neglect to pay the debt'—Petition maintainable—Income tax Act (XI of 1922), section 46	126
Conduct of Election Rules (1961), rule 94-A—Scope—Affidavit in support of election petition sworn before District Court Clerk of Court appointed under section 139 (c) Code of Civil Procedure (V of 1908)—If sufficient compliance with rule 94 A	34
Constitution of India (1950), Article 5—Iranian National registered under Foreigners Rules 1939, residing in India for over 5 years before 21st November, 1949 under residential permits renewed from time to time under Foreigners Order 1946—If can claim to be citizen of India under Article 5 of the basis that he had his domicile in the territory of India	334
—Article 133—Appeal to Supreme Court—New Case cannot be set up for the first time	310
—Article 133—Appeal to Supreme Court—New plea—Cannot be raised when there is utter lack of factual basis to sustain the plea	324
—Articles 133 and 136—Representation of the People Act (XLIII of 1951) section 116-B—Jurisdiction conferred by Articles 133 and 136—Cannot be restricted by section 116-B	241
—Article 226—Discretion of High Court to issue writs under	270
—Article 226—Period of impugned contract coming to end after a very short time from date of order—Writ will not be issued to cancel order of Government granting the contract	194
—Article 226—Scope and object—Sales tax assessment—Remedy available under the Sales Tax Act—Petition under Article 226—Not to be entertained—Nature of order that can be made under Article 226	161
—Article 235—District Judge—Is subject to 'control' of the High Court—'Control'—Includes disciplinary jurisdictions	59
—Article 311—Right of charge-sheeted officer to be given opportunity to lead oral evidence if he desires—Enquiry officer if can say that having regard to the charges he would not hold an oral enquiry—Civil Services (Classification Control and Appeal) Rules rule 55—Scope	181
—Article 341 (1)—Constitution (Scheduled Castes) Order 1950 issued by President under Article 341 (1)—Public notification regarding scheduled castes—Plea that Dehar caste is a sub-caste of Chamar caste—If can be entertained	77
Contempt of Court—Trial of a member of All India Services before the Special Judge—Pending petition in Supreme Court for transfer—Departmental proceeding for contravention of (Conduct) Rules prohibiting disclosure of official documents and information—Charge of disclosure to his advocates of the member in regard to writ proceeding in High Court—Likely to amount to obstruction of administration of justice and putting person under duress—Contempt—Action of State deprecated	139

Contract Act (IX of 1872), section 73—Illustration (k)—Contract by X for sale of iron scraps to Y—Y entering into similar contract with third party for export—Breach by X of original contract—Y unable to supply third party who purchased from open market and recovered the difference in price from Y—Y when entitled to recover the amount as damages from X .. .. .	196
—section 126—Execution of a joint-promissory note along with two other documents on the same day as security for an overdraft account—Status of one of the signatories to the promissory note if that of co-surety or co-obligant—Determination of—All the documents being parts of same transaction should be read together—Applicability of section 92 of Evidence Act (I of 1872) .. .. .	317
—as amended by Indian Contract (Amendment) Act (1930), sections 172, 178 and 180—Pledge of goods covered by documents of title such as a railway receipt—If could be validly made by owner by transfer of the documents of title representing the goods—Endorsement of railway receipt as security for advances made to the owner of goods—If operates as a pledge of the goods covered by the railway receipt—Right of such endorsee to sue the railway for non-delivery of goods—Measure of damages .. .. .	6
Contract of Insurance—Essentials—Condition in policy giving power for cancellation at will—Mutual—Binding on parties—Power of cancellation to be exercised before commencement of risk .. .. .	101
Criminal Procedure Code (V of 1898), section 526 (1) (ii)—Scope—High Court if competent to transfer case pending before a Magistrate for trial to a Court of Sessions Judge .. .. .	42
—section 527 and Criminal Law Amendment Act (XLVI of 1952), sections 6, 7 and 8—Case pending before the Special Judge under the Act of 1952—Petition in Supreme Court for transfer to Court of equal jurisdiction under High Court of another State—Jurisdiction—No inconsistency between section 527 of Code and section 7 (2) of Act of 1952—Transfer of case—Ground of reasonable apprehension of denial of justice, essential—General feeling of hostility of persons, in sufficient—Likely interference with course of justice to be made out—Practice—Question of inherent jurisdiction—To be tried first before dealing on merits .. .. .	139
Custom—Punjab—Jats in Amritsar District—Customary adoption—Adopted son when entitled to collateral succession .. .. .	363
Deed—Several deeds forming part of one transaction executed on the same day—Construction .. .. .	317
Election Commission—Powers—Desirability of legislation vesting powers pointed out .. .. .	166
Electricity Act (IX of 1910) (as amended by Act XXXII of 1959), section 6—Scope—Electricity Board for the state exercising option to purchase the undertaking but notice to licensee not being in accordance with law—Effect—State Government if vested with the option under section 6 (2) of the amended Act .. .. .	204
Evidence Act (I of 1872), sections 24 to 30—Confession—Confessional soliloquy—If direct piece of evidence—Weight to be attached to such evidence .. .. .	172
—section 115—Estoppel by representation—No estoppel against person who knows the true state of facts .. .. .	310
—sections 157 and 32 (7)—Scope and applicability .. .. .	95
Family settlement—Requisites for validity—Registration when essential—Registration Act (XVI of 1908), section 17—Applicability .. .. .	290
Foreign Exchange Regulation Act (VII of 1947) as amended by Act (XXXIX of 1957), sections 23 (1) (a) and 23-D—Contravention of section 23 (1) committed before the amended Act (XXXIX of 1957) came into force—Adjudication proceedings under the amended provisions—Legality—Amended section 23 (1) (a) if contravenes Article 20 (1) of the Constitution of India (1950) .. .. .	227
Guardians and Wards Act (VIII of 1890), sections 25, 47 and 48—Petition under section 25—Order thereon appealable under section 47—Appellate order, finality of—Rajasthan Ordinance (XV of 1949), clause 18 .. .. .	265
Gwalior War Profits Tax Ordinance, Samvat 2001, as amended by Ordinance, Samvat 2002, Samvat 2004, rule 3 of Schedule I, Explanation—War Profits-tax—Assessee, managing agents of company—Receipt of dividend income on the shares of the company—Business of the company, subject to assessability under the Tax Ordinance—Dividend—Exclusion from taxable income of the assessee under the Explanation enacted subsequent to the Ordinance—Retrospective application .. .. .	397
Hindu Law—Brahmin woman whose husband was alive becoming concubine of sudra and having children by him— <i>Aaruddha Stree</i> entitled to maintenance out of paramours estate for herself and her children—Right to maintenance if destroyed by	

Hindu Adoptions and Maintenance Act (LXXVIII of 1956) coming into force during pendency of appeal against decree giving maintenance	179
—Joint family—Hindu brothers—Presumption of joint family—Severance—Onus of proof—Evidence Act (I of 1872) section 21—Admissions—Admissibility in evidence—Failure to confront under section 145 maker of such statement in witness box—Effect	53
Income-tax Act (XI of 1922) sections 16 (2) and 18 (5)—Dividend income—Assessee Hindu undivided family, owner of shares—Karta thereof registered holder of the shares—Income assessable as that of Hindu undivided family—Dividend income—Principle of grossing up—Nothing to do with accrual of income—Accrual to the real owner	20
Insurance—Proposals letters of acceptance cover notes and policies nature and interpretation of—Cover notes if to accompany letters of acceptance—Reference therein to conditions in policies—If effective	101
Interpretation—Statute—Tax Ordinance—Explanation added by first amendment—Second amendment—Insertion of a comma between words in the explanation and enacting comma would be deemed to be always therefrom the date of Tax Ordinance—Intent on to render the explanation also retrospective clear	397
Iron and Steel (Control) Order (1956) clause 7—Construction—“Use” —If includes non use —Conditions of permit—Application for permit if can be looked into to find out	200
Judicial Officers’ Protection Act (XVIII of 1950) section 1—Protection afforded to acts done in judicial capacity only—Charge of false imprisonment made against the officer—No formal complaint lodged—No report made by any police officer in writing—No plea by the officer that the act was done in his judicial capacity—Admiss on that he had acted under the orders of the superior officer—Act was reckless malicious, concurrent finding of Courts below—No protection under the Act	1
Land Acquisition Act (I of 1894) sections 4 5 and 6—Number of declarations under section 6—If can be issued successively in respect of different pieces of lands within the local ty specified in a notification under section 4 of the Act	231
Letters Patent (Lahore) (as amended in 1928) clauses 10 and 11—Delhi Rent Control Act (LIX of 1938) sections 39 and 43—Decision of single Judge of Punjab High Court in Second Appeal under section 39 of Delhi Rent Control Act—Appeal from to Division Bench of same High Court under clause 10 of Letters Patent—Competency—Section 43 of the Rent Control Act—Effect	69
Limitation Act (IX of 1908) section 2 (4), Articles 142 and 144—Article 142 when attracted—Suit governed by Article 144—Computation of period of limitation—Tacking of adverse possession of independent trespassers—Permissibility	157
Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948) sections 2 (15) (16) and 3—Madras Estates Land Act (I of 1903) section 3 (2) (c)—Moithurambedu village in Madras State—If zamindari estate or under tenure estate—Not fixt on under section 3 of Act XXVI of 1948 taking over the said estate as zamindari estate—Validity	213
Madras Hindu Religious and Charitable Endowments Act (XXIX of 1951) section 62 (3-a)—Application by Commissioners for modifying Scheme under which the Trustee was administering the Temple—No proof of any of the charges levelled against trustee—Appointment of an Executive Officer to be in charge of administration—Not warranted—Madras Act XXII of 1959 enacted after the suit—Plenary powers of Commissioner	81
—sections 67 93 103 (i)—Institution held to be not a Math under the Madras Act II of 1927—Finality of the decision—Claim for contribution and audit fees on the basis that it was a Math—Not sustainable under Madras Act II of 1927—Injunction to restrain levy of contribution under Act XIX of 1951—Question cannot be entertained in a suit not instituted under section 62 of the Act of 1951—Section 103 (1) of Act of 1951—No countenance of levy was alleged under the Act of 1927—Estoppel—Institution is one outside the Act of 1927—Act of Head of Institution—Not to affect the position of the Institution	175
Math—Expenses of suit by the rightful claimant to Gaddi—Binding on the Math and its properties—Mortgage by the Mathadhipati to secure payment of such debts—Alienation of properties to salvage a part of the property sold under the sale in execution of the mortgage decree—Legal necessity—Test of	220
Motor Vehicles Act (IV of 1939) sections 58 and 63 and G.P. and Berar Motor Vehicles Rules, 1940 rules 61, 62 and 63—Scope—Inter regional permits, renewal of—Renewal of counter-signature for a different region—Authority competent to make—Word “may” in rule 63 (a)	354
—section 63 and Central Provinces and Berar Motor Vehicles Rules (1940), Rule 63—Scope and effect—Inter regional permit—Renewal of permit but refusal of counter signature—Effect—If Regional Transport Authority having jurisdiction over rest of route to give counter-signature	37

	PAGE
Mysore University Act (XXIII of 1956), sections 22, 23 and 43—Powers of Academic Council under—If includes power to make a regulation that no candidate who fails four times shall be permitted to continue the Bachelor of Veterinary Science Course .. .. .	306
Mysore Village Offices Abolition Act (XIV of 1961)—Constitutional validity—Act if void as colourable legislation .. .. .	329
Penal Code (XLV of 1860), section 84 and Evidence Act (I of 1872), section 105—Illustration (a)—Scope—Defence of insanity—Onus.. .. .	281
Practice—Single judge considering earlier decision require reconsideration—Proper procedure .. .. .	295
Prevention of Food Adulteration Act (XXXVII of 1954), section 2 (xii)—“Sale”—Includes sale to Food Inspector for analysis— <i>Mens rea</i> —Defence of section 16 (1) (a) read with section 7 (v)—Prosecution for offences under—Certificate of Public Analyst—If sufficient to his conviction—Joint trial of wholesaler of Bombay and retail seller of Nasik—Legality—Criminal Procedure Code (V of 1898), sections 537 (b) and 182—Scope .. .. .	87
Provincial Insolvency Act (V of 1920), sections 6, 7 and 25—Debtor's property sold in execution of money decree—Sale set aside under Order 21, rule 89, Civil Procedure Code—Act of insolvency if wiped out—If sufficient cause for refusal to adjudicate under section 25 .. .. .	350
Rajasthan Minor Mineral Concession Rules, Rule 36—Auction for grant of royalty collection contract—Government if bound to accept highest bid and confirm contract—Discretion of Government to relax the Rules—Rule 59.. .. .	194
Registration Act (XVI of 1908), section 17—Award—When requires registration .. .. .	285
Representation of the People Act (XLIII of 1951) (as amended by Act LVIII of 1958), section 7 (d)—Scope—Effect of amendment made in 1958—Section as amended if embraces only executory contracts—Contract in contravention of Article 299 of the Constitution of India (1950) and in fact not ratified—If falls within the ambit of section 7 (d) .. .. .	241
—section 192 (2)—Construction and scope—Question of disqualification—How can be raised .. .. .	166
Sea Customs Act (VIII of 1878), section 167 (81)—Importing of goods against restrictions under the Act—Smuggled goods passing out of the hands of the actual smuggler—In possession of persons unconnected with actual import—Liability for confiscation—‘Concerned’ in dealing with prohibited goods—Question depends on facts of each case—Dealing in prohibited goods under a prior arrangement—Accused apprehended in the attempt—Whether ‘concerned’ .. .. .	111
Supreme Court Rules (1950), Order 16, rule 14-A—Scope—Civil Procedure Code (V of 1908), Order 22—Appeal against preliminary decree—Death of respondent—Legal representative impleaded in final decree proceedings—If saves appeals from abatement .. .. .	302
Transfer of Property Act (IV of 1882), section 51—Compensation for improvements—Cannot be claimed by person effecting improvements on property knowing that he has no right to such property .. .. .	310
Travancore-Cochin High Courts Act (1949) (V of 1125-M.E.), sections 20 and 21—Suit valued in excess of Rs. 1,000 instituted in District Court when the Act was in operation—Provision that appeal valued in excess of Rs. 1,000 was to be heard by Bench of two Judges—Kerala High Court Act (V of 1959) coming into force during pendency of appeal—Appeal if can be heard by single Judge as provided in section 5 of Act (V of 1959). .. .. .	50
Tribunals dealing with rights of citizens—It bound to adopt judicial approach .. .. .	295
U.P. Court of Wards Act (IV of 1912), sections 37 and 53—Scope and effect—Sanction under section 37 for adoption by ward—Adoption in pursuance of—Validity of, if can be questioned in Civil Court .. .. .	95
U.P. Zamindari Abolition and Land Reforms Act (I of 1951), section 6 (d) and rule 8-A of the Rules—Compensation bonds issued by the State Government to the intermediaries—If should be accepted in payment of agricultural income-tax due from them .. .. .	190
Uttar Pradesh (Temporary) Control of Rent and Eviction Act (III of 1947), section 7-F—Revisional jurisdiction of State Government—If quasi-judicial—Order made without hearing opposite parties—If bad as opposed to principles of natural justice .. .. .	295
West Bengal Premises Tenancy Act (XII of 1956), sections 17 and 22—Deposit before Controller under section 22 after filing of suit—If sufficient to bar applicability of section 17 (3) .. .. .	145



West Bengal Service Rules Rule 75 (a) modelled on rule 56 (a) of Fundamental Rules but having no rule corresponding to rule 56 (d) of the Fundamental Rules—Scope—Retention in service after superannuation merely for purpose of suspension and departmental enquiry—Propriety	59
Words and Phrases— <i>In any way concerned</i> — <i>In any manner dealing with prohibited goods</i> — <i>Concerned in</i> — <i>Deal with</i>	111
— <i>Use</i> —If includes non use	200

## HINDU LAW IN HISTORICAL PERSPECTIVE

By

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To a student of comparative law, Hindu law indeed offers a rich field of study. This time honoured system of law and jurisprudence, having "the oldest pedigree" of any known legal system<sup>1</sup>, perhaps marked "the dawn of law itself on this planet."<sup>2</sup> Even to this day it governs huge masses of people, four hundred million of them, and "shows no signs of decrepitude." J. D. Mayne, therefore, rightly emphasized: "No time or trouble can be wasted, which is spent in investigating the origin and development of such a system and the causes of its influence."<sup>3</sup>

Apart from this, in order to understand the present Indian legal system, and in fact India itself, it is necessary to study it in historical perspective as it developed through the ages. It is puerile to "disregard the beginning and omit historical causes and take up the subject-matter . . . with unwashed hands."<sup>4</sup> The true nature of things is said to lie in their genesis. As Mr. Jawaharlal Nehru, with great insight into the past, present and the future of India, himself put it:

All that we are and all that we have comes from the past. We are its products and we live immersed in it.<sup>5</sup>

It has been rightly pointed out that no other country today looks so deeply into the past in order to find sanctions for the present as India. The authority for every change in the present dynamically changing society is to be found in the ancient Indian texts. The history of India and its legal institutions have therefore more than academic interest. A dispassionate understanding of the past is essential in order to have a healthy attitude for the future.<sup>6</sup>

In order to trace the history of Indian law we have to go thousands of years back and examine the evidence of that pre-historic age when it originated, and study the history of the Hindu race which developed it according to its own genius. This, however, is not an easy task, especially in a land where "history is an exotic science" and there is not a date until recent times nor even a personality in the legal history which is not disputed among scholars.<sup>7</sup> There is neither time nor space here to meddle in these controversies. Amidst this mass of controversial dates and personalities, however, we find a magnificent system of law, with high juristic principles and rich legal theories, developing from age to age and presenting such an exciting and near perfect picture of law at a very early age that it can be compared favourably with any ancient system of law. It is to these general and basic principles of Hindu law, which are valid even today and applied though in a different garb, that we shall devote our attention in the following pages.

The legal history of India, though blurred to some extent due to age and authentic historical research, is roughly divided into five distinct periods of development, viz., Vedic, Smritis, Digests and Commentaries, English influence, and the modern. It may be pointed out, however, that there is no certain demarcation

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1. Mayne, *Treatise on Hindu Law and Usage* iii (11th ed., 1950).

2. Pal, *The History of Hindu Law* iii (1958) (Tagore Law Lectures, 1930).

3. Mayne, *Treatise on Hindu Law and Usage* (11th Ed.), p. iii.

4. Pal, *The History of Hindu Law*, p. 6.

5. Nehru quoted in Malaviya, *Village Panchayats in India* 1 (1956).

6. Spellman, *Political Theory of Ancient India* xxi (1964).

7. Seymour Vesey-Fitzgerald, "Hindu Law", 9 *Encyclopedia of the Social Sciences* 259 (1937).

line between these periods and they must be regarded as more or less different stages of development in the Hindu legal history

**Vedic Period.**—Although covering an epoch measured not by centuries but by millenniums little is known about the exact nature of law or legal institutions during the Vedic Age.<sup>8</sup> The only knowledge that we have of this period is based on the evidence of the Vedic literature which is still available. Of the four well-defined literary strata of this far fetched age the first and most important is that of the four Vedas (*viz.*, Rig, Saman, Yajur, and Atharva), which are supposed to be the primary and paramount source of all Hindu law and are believed to be the language of divine Revelation.<sup>9</sup> Traditionally referred to as *Śruti*, or record of what had been heard by seers (*Rishis*) to whom they were revealed these Vedas are mainly collections of hymns recited or chanted at sacrifices to the gods or they deal with religious rites and social customs and contain very little of lawyers' law. They are, therefore, not of much practical use.<sup>10</sup>

As the Vedic hymns acquired an ever increasing sanctity with the passage of time because of the devout faith of the people in sacrificial offerings, they gave rise to the Brahmana literature (900-800 B.C.) which are extensive codes containing elaborate hair splitting explanations of the Vedic ritual and speculations on the meaning of hymns. The Brahmanas in the course of time themselves acquired a sacred character.<sup>11</sup>

It was not long before some of the open and alert minds became dissatisfied with the age worn ritualism of the Brahmanas. While drawing their inspiration from the Brahmanas they deprecated the meaningless ritualism of the earlier literature and indulged in deep philosophical speculations containing rich thought about the problems of life and death which are all recorded in the Upanishads, composed between 800 and 700 B.C. One of the several systems of philosophy contained in these Upanishads, *i.e.* Samkhya, it may be noted gave rise to two heterodox religious systems of Buddhism and Jainism which denied the authority of the Vedas and opposed the Brahmanical system and ceremonial.<sup>12</sup>

As this reactionary spirit began to shake the foundations of orthodox structures of social life it was soon met by renewed forces of conservatism which took the form of Kalpa Sutras, compiled between 600 B.C. and 300 B.C. They comprised the *Srauta*, *Grihya*, and *Dharma* Sutras, which in the form of brief rules or aphorisms, sought to simplify and bring within convenient compass the mass of all sacrificial and domestic rites traditions and daily observances which had grown unwieldy. They served as a *memoria technica* of a vast mass of sacrificial ritual for the use of the learned men of different schools for help in teaching or laying down the law in case appeal was made to them.<sup>13</sup>

The Brahmanas and Upanishads, it must be remembered, were not works on law. But they do throw a great deal of light on the society and its mind from which Hindu law emanated and grew. *Dharmasutras*,<sup>14</sup> on the other hand,

8 The Vedic period whence Hindu Law is believed to have originated is said to date between 4000 B.C. and 300 B.C. These dates are however more or less conjectural and there is a great dispute among scholars on the subject. See Kane, 3 *History of Dharmasāstra* xvii (1946), Pal, *The History of Hindu Law* pp. 7-8.

9 *Rigveda* which is said to be the oldest and most important of these collections, is dated about 1000 B.C. Cf. Pal, *The History of Hindu Law*, p. 38.

10 See Sen, *The General Principles of Hindu Jurisprudence* 10-12 (1918) (Tagore Law Lectures, 1909) Mayne, *Treatise on Hindu Law and Usage* (11th Ed.) p. 19 of Kane, 1 *History of Dharmasāstra* 4 (1930).

11 See Sinha, *Sovereignty in Ancient Indian Polity* 40-42 (1938) Pal, *The History of Hindu Law*, pp. 10 ff.

12 Sinha, *Sovereignty in Ancient Indian Polity* pp. 80-84-5.

13a Sen Gupta, *Evolution of Ancient Indian Law* 12 (1953) (Tagore Law Lectures 1950).

13 *Srauta* *utras* and *Grihyasutras* deal with rituals and domestic ceremonies to be performed, *e.g.* at birth, marriage, death and after. Pal, *The History of Hindu Law*, p. 12.

were the first law-codes, though they were not exclusive codes on civil or positive law. These were treatises written for giving the rules of guidance for the different stages of life and the rights and duties of all Aryans, which included some legal rules as well. The *Dharmasutras* covered a wide range of topics which included not only the precepts for the moral duties of all Aryans, but also the special rules regarding the conduct of Kings and the administration of justice.<sup>14</sup> Various *Dharmasutras*, each of them bearing the name of some great sage of a preceding period, such as Bandhayana, Apastamba and Vasishtha,<sup>15</sup> in time came to acquire great sanctity and became an important source of law.<sup>16</sup>

Without going into the unsolved mystery of the appearance of Aryans on the Indian horizon,<sup>17</sup> their early settlement and conquests and ways of life, the details of which are hardly available, it is interesting to examine the rudimentary evidence provided by the above-mentioned sources in regard to the nature of law and legal institutions existing at that time. It has rightly been said that in India there is no twilight before dawn. The very earliest record that we find in the *Rigveda* (composed about 1000 B.C.) and the culture which is testified by it is already strong, rich in potentiality and typically Indian. That there is a long history of Hindu law even before this period is clear from the fact that there is found a philosophy of law in this early literature. There is little doubt that "law is a plant that lives long before it throws out bulbs. It is rooted for millenniums before it gathers the food and develops the nucleus for a new life that inquiries into the reason for its being and for the directions and character of its growth."<sup>18</sup> It is indeed interesting to examine the theories of law of the early Hindu sages in order to understand and appreciate the history of the system.

**Rigvedic Concept of Law.**—In *Rigveda* we find that the Aryans had a tribal organization, a cult of fire sacrifice or *yajna* in honour of their gods, and the most important concept of cosmic order or *rta*. The Rigvedic concept of *rta*, which was later transformed into *Dharma* or law, consisted in the idea that an order or system is inherent in physical phenomena. Everything in the world moves naturally to a specific purpose. The appearance of sun and moon, of day and night, is strictly regulated; and this harmony, this regulating principle, is what they called *rta*.<sup>19</sup> It was their gods who were instrumental in preserving this cosmic order, and therefore they merited offerings in the shape of fire sacrifice.<sup>20</sup> But even the gods, powerful as they were, were subject to this eternal order, *rta*. In fact the gods were conceived of as existing only for the purpose of maintaining the law.<sup>21</sup>

Though the early Vedic philosophers conceived the philosophy of law variously, there was one conception which was common to and foremost among them all. They conceived of law as *rta*, as the organized principle of the universe, as also the divine ordering of earthly life. *Rta* is conceived of as eternal, not a history. It existed before 'time,' as a phenomenal reality. "From Fervor kindl-

14. Pal, *The History of Hindu Law*, p. 13.

15. They were, according to Dr. Sen Gupta, not original works of certain individuals but embodied the traditional learning of the school to which the traditional author belonged. N. C. Sen Gupta, *Evolution of Ancient Indian Law*, p. 12.

16. Sinha, *Sovereignty in Ancient Indian Polity*, p. 83.

17. There is a great controversy about the original abode of the Aryans and their appearance on the Indian horizon. According to some scholars, India was their original home and there cannot be any question of their immigration from outside. See Majumdar (ed.), *The History and Culture of the Indian People* 25 (1951); Pal, *The History of Hindu Law*, pp. 35, 38.

18. Pal, *The History of Hindu Law*, p. 16.

19. *Ibid.*, p. 116.

20. Sinha, *Sovereignty in Ancient Indian Polity*, p. v.

21. Pal, *The History of Hindu Law*, pp. 146, 152.

ed to its height Eternal Law and Truth were born and even this took place prior to all existence Every other phenomenon every other created thing grew out of it by a process of natural evolution Before there could be any society any social ideality *rita* evolved the ordering principle came into existence even before there was any diversity Law is eternal and immutable the conditions of life must harmonize with law must fit in in the natural sequence of the rise of the universe with *rita*, the primal principle <sup>22</sup>

*Rita* or law however being the ordering principle of social order (which was viewed only as a part of the universal order) was thought to be imbued with social or human purposes conducive to human benefit and was exemplified in the flow of rivers which fertilize the fields in the cattle useful to man and in the institutions of family and State <sup>23</sup>

According to Dr Berolzheimer the Vedic idea of *rita* influenced the legal and ethical theories of the Greeks and Romans As he says

Closely connected with the religious and philosophical views of the Aryans are certain fundamental positions in regard to the philosophy of law which in turn became the antecedents of later legal and ethical developments among the Greeks and Romans Foremost among these philosophical conceptions is *rita* which is at once the organized principle of the universe and the divine ordering of earthly life

He further points out that the Romans through the Greeks derived from the Vedic *rita* their central conception *ratum, ratio, naturalis ratio*, and Augustine Christianized *rita* into *pax*—which means not peace but that which brings peace the blissful sacred order <sup>24</sup>

**Political and Social Organization in the Vedic Period.**—As depicted in *Rigveda*, the early political organization of the Aryans was tribal But as time passed under the pressure of conquest this tribal organization disintegrated and gave way to territorial organization The exigencies of the time and military necessity gave rise to the institution of kingship which derived its validity from the consent of the people <sup>25</sup> The king was elected by the people and was expected to fulfil certain duties He could be removed from his office and could be brought back from exile The office of the king was the creation of the people and was held conditionally There were two popular bodies called the *Samiti* or tribal assembly and the *Sabha*, the council of elders and powerful men who perhaps chose the king and helped him in time of need <sup>2</sup>

As time passed the powers of the king increased and his office became hereditary In the age of Brahmana literature it is no longer elective in the real sense Although the normal form of government in the early Vedic period was that by kings there are indications that some other forms of government were also known at that time In fact eminent scholars such as Professor Jayaswal and Professor Sarkar have established that republican form of government was known in the later Vedic age and numerous Hindu republics were existing between 600 B C and 450 B C <sup>3</sup>

<sup>22</sup> Pal *The History of Hindu Law* pp 159 ff.

<sup>23</sup> *Ibid* p 144

<sup>24</sup> Quoted by Pal *Ibid* p 109

<sup>25</sup> Majumdar *The History and Culture of the Indian People* p 426 Kane *History of Dharmasast*, pp 20-1

<sup>1</sup> Pal, *The History of Hindu Law* p 10<sup>2</sup> also see K. M. Panikkar *Origin and Evolution of Kingship* p 23 (1938)

<sup>2</sup> Majumdar *The History and Culture of the Indian People* p 303

<sup>3</sup> Jayaswal, *Hindu Polity* 21 ff (1920) Sarkar *The Political Institutions and Theories of the Hindus* 139 ff (1922)

**Origin of castes.**—There was another development during this period which immensely affected the course of Hindu legal history. Along with the increase of power of the king and his soldiers, owing to the frequency of wars, there arose a class of warriors itself whose duty it was to be always ready to fight. The frequent warfare also enhanced the importance of sacrifice and religious rites since the assistance of gods stood them in good stead in winning wars. For that purpose the services of priests had to be requisitioned and this led to the importance of a class of persons who were adept in the performance of sacrifices. Moreover, with the conquests of vast areas and with growing needs of society, agriculture and other arts and industries came to be widely and efficiently practised. Thus arose the different classes, which later changed to the castes of *kshatriyas*, *brahmanas*, and *vaishyas*.<sup>4</sup> But these groups had not yet crystallized into rigid castes of the later times, nor were they hereditary at this stage.<sup>5</sup>

Apart from these classes of Aryan society, non-Aryans who were conquered and enslaved were gradually transformed into a fourth class, i.e. *Sudras*. From being enemies they were brought into friendly relations and given a very subordinate position. A clear line of demarcation was, however, kept between the Aryans and the *sudras* in the times of *Brahmana* works and even in the *Dharma-sutras*, due perhaps to a feeling of contempt arising out of their different origin, civilization, and former enemy character.<sup>6</sup>

Thus were born the four orders of society or the four *varnas*. The system of four *varnas* had taken deep roots when the *Brahmana* works were composed and the privileges, duties and liabilities of the four classes had become more or less fixed.<sup>7</sup> Brahmins or the priestly class, because of their learning and nobility of character, together with the devout faith of the people in the efficacy of the religious and sacrificial offerings, gradually came to occupy a position of supremacy over the people which affected the course of history in no uncertain degree. It is important, however, to notice that the Hindu state never became theocratic or sacerdotal in the strict sense. Brahmins, in spite of their ever-increasing and predominant authority in the society, had no organization of their own and they could not usurp political power in India. As sacrosanct priests and legists and spiritual preceptors of the king and the people, they exercised considerable influence, but the real or active power remained with the king, the *kshatriya* aristocracy and the commons.<sup>8</sup>

**Concept of Law in the Upanishads.**—Law up to this time, though regarded as divine and sacred, consisted of customs and usages of the society which in the course of time had come to acquire a sacrosanct character. Administration of justice had not yet far progressed and disputes between people were apparently decided by the community, the family or the guild to which they belonged. Though it was the king's duty to keep order and to compel people to perform their duties, a regular system of king's justice had not yet come into existence. Rarely and only in cases involving questions of public importance or violence did he intervene and settle the disputes.<sup>9</sup>

Though the light thrown by history is rather dim and we have only scanty evidence of the nature of law and the administration of justice, it is interesting to notice in the *Upanishads* the conscious thinking about the end of law, and its authority and function in a society. The end of law was said to be to ensure order

4. See Sinha, *Sovereignty in Ancient Indian Polity*, pp. vi-vii.

5. Kane, 2 *History of Dharmasastra* (Part I) 25-31.

6. *Ibid.*, pp. 33-6; Pal, *The History of Hindu Law*, pp. 70 ff.

7. *Ibid.*, pp. 36-8; Pal, *Ibid.*, p. 77.

8. See Sri Aurobindo, quoted by Pal, *The History of Hindu Law*, p. 105; Varadachariar, *The Hindu Judicial System* 32 (1946); Altekar, *State and Government in Ancient India* 51-5 (1958).

9. Sen Gupta, *Evolution of Ancient Indian Law*, p. 10.

in the society in the universe. It was indeed designed to keep peace at all events and at any price. It was pointed out in the *Bṛihad Aranayaka Upanishad* that when the creation became full of diversities and there was nothing to hold fast these diverse elements when even the creation of 'wisdom' 'might' 'the people,' and 'the nourisher' failed to ensure security then He (God) created still further 'the most excellent law'. 'Law is the *ksatra* (power) of the *ksatra* (powerful) therefore there is nothing higher than the law'. This creation of law helped in complete realization of the end. Thenceforth even a weak man ruled a stronger with the help of the law.<sup>10</sup>

Law, according to the author of this *Upanishad*, is more powerful than power itself and exists without the sovereign and is above the sovereign. This ancient philosopher is thus not only opposed to the absolutist doctrine of the unlimited power of the State but even discards the doctrine of self limitation. "The power of the sovereign the power of the State is limited not by itself, but by some inherent force of law". According to this philosopher 'there is a rule of law above the individual and the State above the ruler and the ruled a rule which is compulsory on one and on the other and if there is such a thing as sovereignty it is juridically limited by this rule of law'.<sup>11</sup>

Law was therefore declared in the *Upanishads* to be divine and immutable.<sup>12</sup> It was supreme the will of the king was not its originator, and its sanction was not derived from any extrinsic agency for it contained its sanction within itself in the certainty that obedience to law would lead to welfare and its violation to misery.<sup>13</sup>

**Law in the Dharmasutras.**—The chief purpose of law as we have already seen was understood by the Vedic sages to be the maintenance of order in the society and the universe. And the only way in which this could be achieved was by strict observance of rites and obligations prescribed for each of the four orders of society and maintenance of the social institutions as described in the *Vedas* and the *Scriptures*. Minutest details were therefore, laid down in *Dharmasutras* to regulate individual conduct in the name of sacred law or *Dharma*, as it came to be called since this period.

Linked up both historically and logically with the Vedic concept of *rita* or universal order<sup>14</sup> *Dharma*, has become the most important single concept of Hindu law. Though generally understood as a synonym of law, it contains a much wider connotation. S. Varadachariar rightly observes

The English language contains no generic term which combines the ethical and legal meaning (of *Dharma*). The Sanskrit language has no term to convey the legal meaning dissociated from the ethical sense.<sup>15</sup>

Etymologically it means that which supports and sustains. From the standpoint of an individual it was said to support and sustain him through the temptations and vicissitudes of life and from the standpoint of the society, it was the source of its solidarity and strength. In fact it was said to be the 'support of the entire world'.<sup>16</sup> The pursuit of *Dharma* signified life in this world with a view to

10 See Pal *The History of Hindu Law* p. 180

11 *Ibid.*

12 *Ibid.*, p. 181

13 Sen *The General Principles of Hindu Jurisprudence* p. 26

14 Sastri *Inter State Relations in As a 2 Indian Year Book of International Affairs* 140 (1953), Kane, *History of Dharmasutra* pp. 244-45

15 Varadachariar *The Hindu Judicial System* p. 29 Kane *History of Dharmasutra* pp. 1-4

16 Sen, *The General Principles of Hindu Jurisprudence* p. 24

the attainment of the ideal life in the life to come and represented "the privileges, duties and obligations of a man, his standard of conduct as a member of the Aryan community, as a member of one of the castes (*varna*), and as a member in a particular stage of life (*asrama*).<sup>17</sup> It was, therefore, not merely a religious concept and an ethical concept but also a sociological concept. Political or social life was conceived as a part of and not independently of the general scheme of man's existence. The effect of this all-embracing *Dharma* hypothesis, regarded as divine and immutable, was that, while

it restricted the sphere of State-action in one respect, in that the State could not make laws..... it extended the State's sphere in another respect, because the State had to supervise the whole life of its subjects and not its material or secular sides only.<sup>18</sup>

Religion or religious beliefs thus played a very important part in the development of Hindu law. The association of law and religion and the belief in the divine origin of law or *Dharma* "served to secure for early law a stability which it would not have otherwise possessed."<sup>19</sup> The *Vedas*, the tradition, and the practice of those who know the *Vedas*, were declared in the *Dharmasutras* to be the three-fold sources of law, mentioned according to their superiority. The rules and customs of different castes, communities, families and localities, which were not opposed to the Scriptures, were expressly recognized as having the force of law. Furthermore, cultivators, traders, herdsmen, money-lenders and artisans had the authority to lay down rules for their respective classes.<sup>20</sup> It was the king's duty to see that each person adhered to the law of the *Varna* to which he belonged. For this purpose it was his duty to administer justice, according to *Dharma*, and with the help of his ministers. Although information relating to the administration of justice is meagre, king's justice had been firmly established and, apart from the ancient popular courts of families (*kula*), *srenis* (guilds) and assemblies, there were other royal courts with the king's court on the top.<sup>21</sup>

While the king was looked upon as the upholder of social and moral order and was the fountain of justice, it is important to note, in the administration of justice he was bound to ascertain the law from learned men and from the families and guilds.<sup>22</sup> The fact that the king received law from an extraneous authority, a source over which he had no control, served as a great check on his power.<sup>23</sup> The law was supreme; the will of the king was not its originator, and its sanction was not derived from any extrinsic agency. In fact, within the sphere of sacred law, the king had his own function which was partly general and partly special in its character. It was general in so far as it was his duty to obey the law like other individuals, and it was special in so far as, unlike other individuals, it was his duty to enforce its obedience in others.<sup>24</sup>

It must be pointed out, however, that while none was above the law or *Dharma*, all were not equal before the law. Law followed the lines of castes and the *Sutra* literature was characterized by the reservation of special privileges to certain classes, particularly the *brahmins*. Though revolting to the present sense of justice, the chief point for consideration in the application of law was the social status of the person and his caste and class. It has been rightly pointed out that

17. Kane, *History of Dharmasastra*, p. 2.

18. Varadachariar, *The Hindu Judicial System*, p. 31.

19. *Ibid.*, p. 37.

20. See *Ibid.*, p. 71 ; Sarkar, *Epochs in Hindu Legal History* 56 ff (1958).

21. *Ibid.*, Sarkar.

22. Sen Gupta, *Evolution of Ancient Indian Law*, p. 39.

23. Sinha, *Sovereignty in Ancient Indian Polity*, p. 113.

24. Sen, *The General Principles of Hindu Jurisprudence*, p. 26.



"the speciality of the Indian law was not its impartiality, but sacredness"<sup>25</sup> In the eyes of these early Aryans, all were not equal before the law as they were not equal in practical life, but equals must be treated equally<sup>1</sup>

**Kautilya's Arthashastra.**—Aside from the orthodox literature on Dharma containing legal, moral, social and religious precepts necessary for the regulation of human life, it is important to note certain works devoted exclusively to the political economy or the actual administration of a State, known as Arthashastras, of which Kautilya's Arthashastra (300 B C) is the most famous and is said to be a compendium and a commentary on all the books on polity existing before him<sup>2</sup> Arthashastras, or the science of acquiring and maintaining the earth, were composed mainly for the instruction of kings in the art of government and diplomacy and dealt with the political administration of a State including the creation and regulation of different departments of government Although the Dharmasutras and other works on Dharma also dealt with the duties of the king or Rajadharma, it is important to remember they dealt with the "same as an incident in a comprehensive scheme of duties deriving their source from the eternal Vedas" The canonical writers therefore mentioned only the rudiments of public administration On the other hand, political writers of Arthashastras were able to treat their subject on a vastly enlarged canvas dealing with the concrete problems of administration<sup>3</sup> Thus unlike Dharmasutras, while dealing with the political administration in general, Kautilya devoted exclusive chapters to the treatment of law and its administration<sup>4</sup> Furthermore, it was mainly secular and as such divorced from all sorts of religious and sacerdotal elements

Said to be a picture of the actual administration during the Mauryan age (324 B C - 181 B C), we meet in Kautilya's Arthashastra a well developed system of law and its administration Kautilya described the king as the fountain of justice, Dharmapravartaka, and as such responsible for the maintenance of Dharma or order among the different castes and asramas (stages of life) Law was to be derived, according to him from Dharma (Scriptures), vyavahara (evidence), charitra (usages) and rajasasana (command of the king), each later being superior to one previously mentioned It is important to note that the king's decree was declared for the first time by Kautilya to have an overriding validity over all other sources of law<sup>5</sup> It must be pointed out, however, that king's power was not unrestricted in this respect. He could pass "only regulatory laws and not laws substantive or laws making him arbitrary"<sup>6</sup> As Dr. Sen Gupta tells us

this law making power of the king was never absolute or unrestricted It was generally confined to making orders in respect of matters which were not covered by the books of law He did not arrogate to him-

25 *Sinha Sovereignty in Ancient Indian Polity* p 200

1 Pal, *The History of Hindu Law*, p 242

2 Kautilya quotes the opinions of four specific schools and thirteen individual authors of the Arthashastra No such works have however been found See U N Ghoshal *A History of Hindu Political Theories* 42 ff (1927), Sarkar, *Epochs in Hindu Legal History*, p 82

3 Ghoshal *A History of Hindu Political Theories*, p 49

4 According to Professor Jayaswal the real origin of Hindu Law is not the Dharmasutras but the Arthashastras, though the Dharma law did greatly influence the municipal law Jayaswal *Manu and Taittiriya* 1 17 (1930) (Tagore Law Lectures 1917) This theory has, however been contested by other scholars See Varadachariar *The Hindu Judicial System* pp 39 ff, Sarkar, *Epochs in Hindu Legal History*, p 84

5 Kautilya's rule on the superior validity of the royal edict was not accepted by his successors with the single exception of Narada (100 AD-400 AD) See Sastri *International Law and Relations in Ancient India* 1 *Indian Year Book of International Affairs* 98 9 (1952), Jayaswal *Manu and Taittiriya*, pp 72 4

6 Jayaswal, *Hindu Polity*, p 310

self real legislative functions but purported only to lay down the rules which were to be deemed to have been in force in his time and to make some administrative arrangements. The laws were more or less in the nature of declaratory laws like the Twelve Tables, and not legislation proper.<sup>7</sup>

It is indeed remarkable to note that in the long history of Hindu India it is not "possible to find any instance of legislation by royal edict."<sup>8</sup> The possibility of a king being empowered to make law was not countenanced in Hindu jurisprudence at all. How this so-called "divine and immutable" law came to be developed and modified with the change in life and circumstances we shall see later. It is important to note here that law was declared even by Kautilya to be supreme; nobody was above the law. The king himself, not to speak of the other members of his family, was equally subject to the law of the realm and, as recorded cases show, there was a possibility of an ordinary person bringing a case against the king before a court of law.<sup>9</sup>

The king was in fact declared to be a servant of the people; his title was supposed to rest on a contract between him and the subjects, he agreeing to protect them and to secure to them prosperity, and to receive in turn taxes as wages of government.<sup>10</sup> The king was required to have a ministry which had a popular origin and he was bound to accept their advice which the ministers themselves translated into action and executed in the king's name.<sup>11</sup> The limited position of the king is well explained by Professor Jayaswal:

With this defined position shackled with checks and limitations....., subjugated under the great constitutional power of the Paura-Janapada (assemblies), with conscience trained to be prone to listen to the public voice, his position really was that of the servant of the state, or rather as our forefathers put it, mercilessly, of a drudging 'slave' (dasya).<sup>12</sup>

King's justice is found to have vastly extended in Arthashastra with a well-developed system of judicial organization. Although it was ultimately the responsibility of the king to administer justice and all the administrative, legal and judicial actions were taken in his name, he was neither expected nor allowed to decide cases all by himself. Theoretically he always presided over the court, but in practice he was enjoined to decide cases only with the aid and advice of his judges and the latter in fact handled all the litigation on his behalf.<sup>13</sup>

Apart from the popular courts of kulas (families), srenis (guilds), and pugas (professional groups), which discharged judicial functions in local areas, royal courts were appointed in the cities of sangrahalna (a group of ten villages), dronamukha (400 villages), and stahaniya (800 villages), and at places where the districts

7. Sen Gupta, *Evolution of Ancient Indian Law*, p. 328.

8. Aiyangar, *Indian Cameralism* 109 (1949).

9. Sarkar, *Epochs in Hindu Legal History*, p. 101; Jayaswal, *Manu and Tainavalkya*, p. 119; Jayaswal, *Hindu Polity*, pp. 310 ff.

10. See interesting comparison between the social contract theory of the Hindus and that propounded by Hobbes, Locke, and Rousseau in Saletore, *Ancient Indian Political Thought and Institutions* 141-47 (1963). See also the effect of the social contract theory on Hindu Law in Jayaswal, *Manu and Tainavalkya*, p. 101; Varadachariar, *The "Hindu Judicial System"* p. 88.

11. Jayaswal, *Manu and Tainavalkya*, p. 95.

12. Jayaswal, *Hindu Polity* p. 340. How far the king actually submitted to these rules is another story. According to some writers these rules had little effect in practice and there were no constitutional means or checks to call the king to account if he transgressed the law. See Altekar, *State and Government in Ancient India* pp. 62, 98-9; Panikkar, *Origin and Evolution of Kingship in India*, pp. 11 ff. Other writers believe, however, that there were real checks and limitations that effectively prevented the king from exercising unlimited powers. Kane, *History of Dharmashastra*, p. 98; Jayaswal, *Manu and Tainavalkya*, pp. 93 ff.; Sen Gupta, *Evolution of Ancient Indian Law*, pp. 39-40.

13. Kane, *History of Dharmashastra*, pp. 268-69; Jayaswal, *Manu and Tainavalkya*, p. 313.

met Finally at the head of the judicial system stood the king's court which was presided over in practice by the Chief Justice or Pradivaka, who was assisted by a number of puisne judges Each next higher court was competent to hear appeal from the lower courts Appeal from the last of these courts lay with the king's court <sup>14</sup>

**Composition of Royal Courts.**—We have already said that the king had no authority to decide disputes personally In fact from the very beginning of Indian legal history there had been a strong sentiment that it was not safe for a single person however clever and learned to undertake to decide a dispute As Varadachariar says

Whether as a rule of the earlier system of assembly justice or because of the unaided powers of the king to administer justice it seems to have been an established principle of the early judicial system in this country that justice should never be administered by a single individual by himself 'No decision shall be given by a person singly is a formula found frequently repeated in the texts <sup>15</sup>

The highest court consisted of a sabha or assembly with the Chief Justice (with or without the king) and three five or seven sabhyas (assessors or puisne judges) as its members The regional courts also consisted of three judges conversant with sacred laws and three ministers of the king <sup>16</sup> These courts were held in high esteem and the judges were highly paid king's officers The court house was regarded as a sacred place and all trials were to be held openly A cause must never be heard in secret was the declared law and if a hearing was held in secret this could be a reason for the charge of partiality by a judge and was punishable by law <sup>17</sup> Kautilya made elaborate provisions regarding the conduct and character of the judges so that they might readily inspire the confidence of the litigants Thus he provided

When a judge threatens browbeats sends out or unjustly silences any one of the disputants in his court, he shall first of all be punished with first amercement If he defames or abuses any one of them the punishment shall be doubled If he does not ask what ought to be asked or asks what ought not to be asked teaches reminds or provides any one with statement he shall be punished with the middle most amercement If a judge makes unnecessary delay in discharging his duty postpones work with spite causes parties to leave the court by tiring them with delay evades or causes to evade statements that lead to the settlement of a case helps witnesses giving them clues or resumes cases already settled or disposed of he shall be punished with the highest amercement If he repeats the offence he shall both be punished with double the above fine and dismissed <sup>18</sup>

Of the two chapters devoted exclusively to law in the Arthashastra, one deals with the topics of litigation called Dharmasthya, and the other relates to Kantaka-Sodhanam or the removal of thorns or punishment of harmful persons thus making a rough distinction between civil and criminal cases While the former were to be disposed of by regular courts, the latter were dealt with by royal officers or commissioners called pradestras, corresponding to coroners or police magistrates of modern times <sup>19</sup> It must be pointed out however that there was hardly any scientific principle of classification between the two sections and several civil

14 Varadachariar *The Hindu Judicial System* pp 78-9

15 *Ibid* p 64 Dikshitar *The Mauryan Polity* 172 (1953)

16 Varadachariar *The Hindu Judicial System* p 79

17 Kane *History of Dharmashastra* p 269 Khosla *Our Judicial System* 16-24 (1949) Jayaswal, *Hindu Polity* p 314

18 Kautilya's *Arthashastra* trans Shamasastry (7th ed 1961) p 252

19 *Ibid* pp 167 ff 227 ff, Kane, *History of Dharmashastra* p 252

and criminal subjects were mixed up. It was for later writers, such as Brihaspati (300 A.D. — 500 A.D.) and Katyayana (400 — 600 A.D.), to point out that law suits were of two kinds according to whether they originated in demands about wealth or in injuries. Law suits originating in wealth were divided by them into 14 categories and those originating in injuries into four categories. The latter were referred to as defamation and abuse, assault and battery, murder and other forms of violence, and adultery. Despite this distinction between civil and criminal cases in later times, however, the same king's courts tried both kinds of disputes and, with some minor differences, the same rules of procedure applied in both cases.<sup>20</sup> But the difference in penalties and procedure that were prescribed for different wrongs indicate the realization of a difference between civil and criminal wrongs.<sup>21</sup>

**Sir Henry Maine's Generalization Incorrect.**—It is interesting to note in this connection the generalization made by Sir Henry Maine about the penal law of ancient communities. On the basis of his study about the ancient western systems, such as those of Greece and Rome, he pointed out that the

penal law of ancient communities is not the law of crimes, it is the law of wrongs or, to use the English technical word, of torts. The person injured proceeds against the wrong-doer by an ordinary civil action and recovers compensation in the shape of money damages if he succeeds.<sup>22</sup>

Dr. Priya Nath Sen rightly points out that this generalization does not apply to ancient Hindu law.<sup>23</sup> In this system, although it was generally directed that neither a king nor his officers should create or foster litigation of their own accord, but should ordinarily refuse to take cognizance of a cause of action without a complaint from the person aggrieved, yet in the many cases of fraud and violence, called *chalias*, *padas*, and *aparadhas*, the king could take cognizance of his own motion.<sup>24</sup> Furthermore, in such crimes as theft, assault, adultery, rape, manslaughter,

the mere payment of compensation to the individual injured.....was seldom regarded as sufficient to meet the ends of justice; of course, under certain circumstances the wrongdoer was compelled to compensate the person wronged, but the compensation was generally levied in addition to and not in substitution for the penalty which it was considered to be the duty of the king to impose.<sup>25</sup>

It may, therefore, be safely inferred that, unlike other Western laws, "the penal law of the Hindus was the law of crimes in the strict sense, and the law of torts occupied a comparatively subordinate and less important position in that system". They condemned a crime not so much because it involved an infringement of a private right, but because it threatened the security and the tranquillity of the people at large. Though they did not develop a regular science of criminology, the ancient Hindu law-givers very well understood the purposes served by punishment of crimes.<sup>2</sup>

20. Kane, *History of Dharmaśāstra*, p. 259.

21. Varadachariar suggests: "The absence of separate Courts to deal with civil wrongs and crimes respectively or the similarity in procedure for both classes of trials is only a matter relating to the machinery and does not affect the principle." Varadachariar, *The "Hindu Judicial System"* p. 217; see also Julius Jolly, *Hindu Law and Custom*, 298-300 (1928).

22. Maine, *Ancient Law* 370 (3rd Ed. 1886).

23. Sen, *The General Principles of Hindu Jurisprudence* pp. 335 ff.

24. See Kane, *History of Dharmasastra* pp. 251, 387-89; Varadachariar, *The "Hindu Judicial System"* p. 215.

25. Sen, *The General Principles of Hindu Jurisprudence*, p. 335; Kane, *History of Dharmasastra*, p. 387.

1. Sen, *Ibid.*, 336.

2. See for an interesting account of the different theories of punishment as expounded by the ancient Hindu writers, Kane, *History of Dharmasastra*, pp. 388 ff.; Varadachariar, *The "Hindu Judicial System"*, pp. 213-14.

Thus in Kautilya apart from elaborate and developed principles of civil law<sup>3</sup> we find an advanced system of criminal law. As on several other subjects on crimes Kautilya is encyclopedic. The number of offences dealt with by him is very large and according to Professor Kane, his treatment in some respects compares favourably with such modern criminal codes as the Indian Penal Code.<sup>4</sup>

**Smṛiti Period.**—The second and most important period of Hindu legal history is represented by the very numerous metrical works which have come down to the present time under the name of Smṛitis. Based in fact on the earlier Dharmasūtras and customs or usages of their times the Smṛitis (literally what is recollected or remembered) are believed to be of human origin and are supposed to contain what was in the memory of the sages of antiquity who were the repositories of the Revelation. Though of lesser authority than the Vedas or revelation (called Śruti or heard) Smṛitis constitute the most authoritative and comprehensive source of Hindu law and are generically known as the Dharmasāstras or institutes of law. Composed between 300 B.C. and 1000 A.D. there are said to be almost one hundred Smṛitis though only very few of them are available today.<sup>5</sup> While little is known of the actual authors and it is difficult to ascertain when they lived there is no doubt that the different Smṛitis were recognized as authoritative statements of law by rulers and by the communities in the various parts of India. Professor Jolly, Jayaswal, Kane and other writers have explained that these classical works on Dharma, and subsequent commentaries and digests on them were mostly composed under the authority of the rulers themselves or by learned and influential persons who were either their ministers or spiritual advisors and were ascribed to various sages or gods in order to enhance their prestige and give them a halo of antiquity and authoritativeness. Thus the several Smṛitis were probably composed in different parts of India at different times under the authority of different rulers.<sup>6</sup> The authors flourishing later had the advantage of utilizing the works of their predecessors and were in a position to modify their rules to provide for later usages and altered conditions of the society.<sup>7</sup> This also gives a glimpse into the Hindu method of legal reform. Although theoretically Hindu law was regarded as divine and immutable and the state had no power of legislation it was in fact developed and modified according to the changed circumstances by new treatises fathered on ancient names. In the name of interpretation and systematization old rules were rejected and new laws enforced. "This method of legal pruning and regard for the popular opinion," Professor Jayaswal correctly points out, resulted in the modification of laws and in effect acted as legislation.<sup>8</sup> During later times however there was a tendency to treat them all as of equal authority subject to the single exception of Manusmṛiti. The Smṛitis quoted one another and tended more and more to modify one another.<sup>9</sup>

There is every reason to believe it is asserted with confidence that the Smṛiti rules were concerned with the practical administration of law in their times and

3 Referring to the law of contracts as expounded by Kautilya Professor Jayaswal says "Almost all the principles of contract which we know today are to be found in the law of the Arthashastra." Jayaswal *Manu and Tattvaśāstra* p. 173. For a detailed discussion of these and other principles of civil law see Jayaswal *ibid.* Shamasastri *Translation of Kautilya's Arthashastra* pp. 167 ff.

4 Kane *History of Dharmasāstra* p. 257. See also Jayaswal *Manu and Tattvaśāstra* pp. 152-53.

4-a. Kane *History of Dharmasāstra* pp. 131 ff.

5 Jayaswal, *Manu and Tattvaśāstra* p. 44. Jayaswal *Hindu Polity* p. 317. Jolly *Outlines of an History of Hindu Law of Partition, Inheritance and Adoption* 28 (1885) (Tagore Law Lectures, 1883). Jolly *Hindu Law and Custom*, p. 49.

6 Mayne, *Treatise on Hindu Law and Usage* (11th Ed.) pp. 20-21.

6-a. Jayaswal *Hindu Polity* p. 317.

7 Mayne *Treatise on Hindu Law and Usage* p. 3.

were accepted as binding in the courts and tribunals of the country.<sup>8</sup> They cannot of course be compared in any way to the law-codes of modern times. They may be said, as Professor Jolly points out; to find thin counterparts to a certain extent in the scientific treatises on jurisprudence which are constantly quoted in judicial decisions in some European countries and have influenced the decisions of the courts and legislation very considerably. In the same way, whenever any difficult problem of law arose in an Indian court, the judges would consult the Sanskrit treatises either themselves or through the medium of *pundits*.<sup>9</sup>

**Treatment of Law in the Smritis.**—Although the subject-matter of the *Smritis* or *Dharmasastras* is not only law but *Dharma* or duty in wider sense, they gave considerable attention to what we call secular law or law proper. Unlike the *Dharmasutras*, which treated law in a "step-motherly fashion"<sup>10</sup> and embraced all domestic, religious and ethical duties with scant attention paid to formal law, we find in the *Smritis* a gradual exclusion of irrelevant matter and the subject of law becoming increasingly secular and more important.<sup>11</sup> Thus Manu and Yajñavalkya devoted separate and exclusive chapters to law or *vyavahara* and later writers such as Narada and Brihaspati, devoted their entire works to the nature and the application of the Hindu positive law. As Professor Hopkins points out, Narada (100 A.D. — 400 A.D.) for the first time gave

a legal code unhampered by the mass of religious and moral teaching with which or out of which the earlier works of *Dharma* arose, a code which in its fine sub-divisions of the titles of law, as well as in its elaborate treatment of slaves, inheritance, witnesses, ordeals, etc. is the first in which law itself is the subject-matter.<sup>12</sup>

We hasten to add, however, that though law thus came to be distinguished and ultimately separated from *Dharma*, the positive law of the *Smritis* could not get rid of the religious influence absolutely in the actual administration of the Hindu society. Some rational elements were introduced in later *smritis*, such as Narada and Brihaspati, but even in them the religious element did not entirely die out.<sup>13</sup> Thus, as we shall see, caste discriminations could never be abolished in Hindu law even in later times.

**Manusmṛiti.**—While theoretically all the *Smritis* were of equal authority, for all of them were supposed to have been based on the pronouncements of the *Vedas*, almost by the universal consensus a superior position came to be accorded to *Manusmṛiti*. Attributed to the primeval Manu, the son of the Creator and progenitor of mankind, this *Smṛiti* is said to have been written during the declining age (somewhere between 200 B.C. and 200 A.D.) of Buddhism and Jainism, the two heretical religions which had originated as a protest against the orthodox Brahmanism and the superiority of the upper class.<sup>14</sup> Being the child of its age, *Manusmṛiti* suffers from political, social, and sacerdotal prejudices. Written during the time of Brahmin revivalism after the disintegration of the strong Buddhist empire of Asoka it is aggressive toward heretics and hostile against heretical Indian republics of its time.<sup>15</sup>

8. Mayne, *Treatise on Hindu Law and Usage* p. 2.

9. Jolly, *Hindu Law and Custom* pp. 28-9.

10. Jolly, *Ibid* p. 33.

11. See Sinha, *Sovereignty in Ancient Indian Polity* pp. 278-79.

12. Quoted by Sinha, *ibid* p. 281.

13. Sarkar, *Epochs in Hindu Legal History*, pp. 23-4; Sen Gupta, *Evolution of Ancient Indian Law*, pp. 336-37.

14. Jayaswal, *Manu and Yajñavalkya*, p. 44; Kane, *History of Dharmasastra*, p. 138.

15. Jayaswal, *ibid* pp. 29-44. It must be said, however, that it was not for the first time that the superiority of Brahmins was asserted, as Professor Jayaswal claims, nor can it be said in all fairness that their position became equal to the lower castes during later times. See Sarkar, *Epochs in Hindu Legal History* pp. 103-04; Varadachariar, *The "Hindu Judicial System"* pp. 40-42; Sen *The General Principles of Hindu Jurisprudence* pp. 345-48.

But despite its strong bias in favor of Brahmins the Manusmriti contains sound juristic principles and a developed system of law. The object of law (or Dharma) and its administration according to Manu, is the maintenance of peace and order in the community. A man honest by nature is rare, society is controlled by the administration of law or *danda* (punishment). Without that the stronger would roast the weaker like fish on a spit and all social embankments would collapse. The Creator created the king for the protection of this world and he created *danda* (the power of punishment) for the sake of the king. *Danda* rules over all people, it protects them all, it is awake even when all others go to sleep. If properly wielded, *danda* protects the State and helps in its advancement but if a voluptuous mean and unjust king wields it and he behaves arbitrarily and is not true to his coronation oath which imposes the condition to follow the law strictly and to maintain it, *danda* recoils on his head and destroys the king together with his relations. The king is thus brought under the law, the rule of law, the sovereignty of law is preached with the greatest vigour. It is asserted that

neither a father, nor a teacher, nor a friend, nor a mother, nor a wife nor a son nor a domestic priest must be left unpunished by a king, if they do not keep within their duties.<sup>16</sup>

The king far from being above the law, had to be more severely punished if he deviated from his duty and it was laid down that 'where another common man would be fined one *karsapana* the king shall be fined one thousand'.<sup>17</sup> As a corollary to this view it was further laid down by Manu that justice was never to be administered by the king personally though the administration of justice was his foremost duty. The king's court was a *sabha* or assembly with the king, chief justice and three, five or seven *puisne* judges (assessors) or *sabhyas* as its members. The *sabhyas* were the real judges and the king was bound to follow their opinion which was declared by the chief justice. The *sabhyas* or assessors appointed by the sovereign to associate with the chief justice in the decision of cases were supposed to be not less than three nor more than seven, an uneven number being required so that in case of disagreement, the opinion of the majority might prevail.<sup>18</sup>

The obligation of impartial justice incumbent on the sovereign and the judges was earnestly inculcated by Manu in language both forcible and unambiguous. It was the duty of the king himself to decide causes according to justice for

Justice being destroyed will destroy, being preserved will preserve, therefore, it must never be violated, lest being injured, it should destroy itself.<sup>19</sup>

The fault of an unjust decision, Manu declared, was apportioned to the offender, the witnesses, the judges and the king.<sup>20</sup>

There are clear signs of the development and extension of the king's justice. Manu divided law under eighteen heads of litigation<sup>21</sup> which, however, show a

16 See quoted in Kane, *History of Dharmasastra* pp. 22-26, *Law, Aspects of Ancient Indian Polity* 149 (1921).

17 Quoted by Sinha *Sixty-eight in Ancient Indian Polity* p. 200.

18 See Jayaswal, *Manu and Taittiriya* p. 113, Colebrook *Hindu Courts of Justice*, 2 *Transactions of the Royal Asiatic Society* 186 (1826).

19 Quoted in Colebrook *ibid* p. 192.

20 Quoted by Kane *History of Dharmasastra* p. 276.

21 Manu's list includes (1) recovery of debt, (2) deposits, (3) sale without ownership, (4) concerns among partners, (5) resumption of gifts, (6) non-payment of wages, (7) non-performance of agreements, (8) rescission of sale and purchase, (9) disputes between the owner of cattle and his servants, (10) disputes regarding boundaries, (11) assault, (12) defamation, (13) theft, (14) violence, (15) adultery, (16) duties of man and wife, (17) law of inheritance, (18) gambling and betting. See Jolly, *Hindu Law and Customs*, p. 35.

clear influence of earlier **Dharmasutras** and **Kautilya's Arthashastra**. Thus his whole law of contract was more or less drawn from Kautilya<sup>22</sup> and other parts of civil law were also based on the earlier works.<sup>23</sup>

It must be pointed out that the classification of the topics or subject-matters of litigation under eighteen heads, a course which was followed by all the later Smriti-writers, was only a matter of convenient arrangement and they did not embrace all the disputes that could be brought before the Courts.<sup>24</sup> Thus a later writer, Narada, explained that by sub-division of these eighteen topics there might be 132 different topics and a hundred different branches.<sup>25</sup> They did not have as rigid forms as the forms of action in ancient Roman Law or the writs of English common law. In fact quite early in its history in India, law reached a stage at which all forms of action were ignored and any complaint in violation of law could become a possible topic of litigation.<sup>1</sup>

**Law and Equity.**—An important feature of early Hindu Law which must be noted is the presence in it of an undercurrent of sound commonsense and justice wearing down the rigidity of the rules without any outside interference. Thus unlike the Roman legal system or English common law, whose hard crust could only be broken by the independent agency of equity, all courts in ancient and medieval India were required to administer the law of the texts tampered by commonsense and reason. As a later writer, Brihaspati (300 A.D. — 500 A.D.) clearly laid down:

A decision should not be given by merely relying on the text of the Sastra; when consideration of a matter is divorced from reason and common sense loss of dharma results.<sup>1-a</sup>

Manu himself declared Vedas, Smriti, practices of holy men, and one's own conscience (clearly a natural law concept of reason) to be the four-fold sources of law. In fact **Dharma** or law was said to be the product of **divine reason** and, though eternal and immutable, it excluded all idea of arbitrariness.<sup>1-b</sup> The nearest approach to it in Western thought is found in the idea of the Law of Nature and its conformity to right reason.<sup>1-c</sup> Judge Anantanarayanan rightly remarks in this connection:

.....We can hardly hope to come across a framework of laws so suffused with natural law concepts, for the spirit of this jurisprudence is Dharma, and Dharma and natural law are fraternal entities of the same heirship.<sup>1-d</sup>

With all the lofty principles of law, however, Manu's work was marked, as we have said earlier, with an aggressive orthodoxy. Law varied with the caste; it gave unreasonable privileges to the Brahmins which put them above criminal penalty in felony and made the Sudras' position no better than slaves. According to Professor Jayaswal the reasons for Manu's harsh code of law toward Sudras lie in the political and social history of India. Manu's chief aim was

22. Jayaswal, *Manu and Yagnavalkya*, pp. 177-78.

23. See Sarkar, *Epochs in Hindu Legal History*, pp. 104 ff.

24. Kane, *History of Dharmasutras*, p. 248.

25. See Sen Gupta, *Evolution of Ancient Indian Law* 234 (1953).

1. Sen Gupta, *ibid.*, pp. 45-6.

1-a. Quoted in Kane, 3 *History of Dharmasastra* p. 259 (1946) ; see also Sen Gupta, *Evolution of Ancient Indian Law*, p. 53 ; Varadachariar, *Hindu Judicial System* 125-6 (1946).

1-b. See Pal, *The History of Hindu Law* 166-67 (1958) ; Sarkar, *Epochs in Hindu Legal History*, 29-30 (1958)

1-c. Sastri, "Inter-State Relations in Asia," 2 *Indian Year Book of International Affairs* 140 (1953).

1-d. M. Anantanarayanan, "Natural Law within the Frame work of Hindu Jurisprudence," 6 *Indian Year Book of International Affairs* 214 (1957).



Brahminical revivalism and the suppression of Buddhism and Sudra in his work signify a Buddhist. This code he believes was never applied in practice and remained merely a controversy<sup>2</sup> rather than the law, on the subject of crimes<sup>3</sup>

**Yajnavalkya (100 A D — 300 A D) and Later Smritis.**—Be that as it may law was thoroughly revised modified and developed by later Smriti writers Yajnavalkya the most illustrious and widely recognized author after Manu wrote a perfectly scientific book treating law as an independent subject in the fashion of a finished lawyer<sup>4</sup>. The scientific attitude and freedom from prejudice—whether on the basis of sex or caste—enhanced the value of this work and it came to be accepted all through India. Yajnavalkya overhauled and re arranged the whole legal and social system—especially criminal law—rejecting the extravagant claims of Brahmins for total immunity and raising the position of Sudras. He thus cured, says Professor Jayaswal, the injury done to the society by the Code of Manu<sup>5</sup>.

In many ways however Yajnavalkya merely followed Manu but arranged his material in a more scientific manner. Like Manu he declared that law was created in days of yore by God in the form of danda or punishment. The king must apply danda to win heaven and fame otherwise he loses both. In unmitigable terms he declared:

Surely neither the king's brother nor his son nor his father in law nor his uncle should be exempted from penalty for infringing their respective duties<sup>6</sup>.

The sanctity of Courts and impartiality of judges is jealously safe-guarded by Yajnavalkya. Like Manu and Kautilya he provided a salutary rule to keep under check the irresponsible propensity of the judges. Yajnavalkya made the jury liable in case of perversity through fear partiality or avarice<sup>7</sup>.

In civil law he made more scientific classifications. In contracts for instance he introduced such technical terms as 'act of God' and 'act of State'. While the breach of a valid contract was recognized as an actionable wrong like an experienced lawyer Yajnavalkya declared that force fraud secrecy want of capacity (in women and minors) enmity intoxication lunacy distress fear and want of authority made contracts incapable of giving cause of action<sup>8</sup>.

Yajnavalkya's description of the royal court of justice agrees with that of Manu. But he strikes a new note by arranging the other courts in an order of descending importance as follows: (1) officers appointed by the king (2) pugas or assemblies of inhabitants of the same village or town (3) srenis or merchants guilds (4) kulas or families.

**Procedural Laws.**—An important development was made by Yajnavalkya in regard to procedural law. In earlier works little attention had been paid to procedure. Thus there was very scanty information about judicial procedure in the Dharmasutras. Manu developed an extensive code of evidence but had little to say on other aspects. With Yajnavalkya the law of procedure was very much developed and in Narada (100 A D - 400 A D) Brihaspati (300 A D - 500 A D) and Katyayana (400 A D - 600 A D) it became complete. There is little doubt as Varadachariar points out that

2 Jayaswal *Manu and Yajnavalkya* 144 ff (1917)

3 *Ibid* pp 50-56

4 *Ibid* p 144

5 Quoted in Colebrook *Hindu Courts of Justice* 2 *Transactions of the Royal Asiatic Society* p 190 Ghoshal *A History of Indian Political Ideas* 167 (1959) Jayaswal *Manu and Yajnavalkya* pp 97 ff

6 Quoted in Colebrook *Hindu Courts of Justice* 2 *Transactions of the Royal Asiatic Society* p 193 see also Jayaswal *Manu and Yajnavalkya* p 119

7 See Sarkar *Epochs in Hindu Legal History* 113 ff (1938)

The advance must mainly have been the result of practical experience in the working, for some centuries at least, of an efficient system of judicature in a well-organized state.<sup>8</sup>

But even in its developed form, it is important to note, procedural law never occupied a predominant position over substantive law in the early Hindu legal system and it was never needlessly formalistic. The general view about the evolution of law therefore that, rules relating to procedure and forms of action were the most prominent in early law and that the rules of substantive law evolved only through the expansion of adjective law<sup>9</sup> does not hold good so far as Hindu Law is concerned. As Varadachariar observes:

This view is the result of limiting their observation to the History of Roman Law and the English Common Law. This does not appear to have been the course of development of the Hindu Law.<sup>10</sup>

In this system substantive law attained greater perfection than adjective law which continued to remain "quite simple, quick and expedient in ancient Hindu society."<sup>11</sup>

Moreover, unlike the Roman and English Common Law, which were extremely formalistic, procedure never hardened in India into inflexible rules. Reason here was never sacrificed for formalities and the need of equity Courts, which became essential both in Rome and England, never arose in India.<sup>12</sup>

**Rules of Procedure.**—Without going into the details of different and elaborate rules of procedure in the later Smritis, it may be generally stated that plaint, answer, proof and decision were declared to be the four feet of litigation. The rules relating to initiation of proceedings were calculated to secure redress or punishment in every case of deviation from Dharma but at the same time to avoid vexatious or needless litigation and unjust harassment.<sup>13</sup> The king and officers were directed not to initiate proceedings nor to hush them up. In case of grave crimes and in certain exceptional cases, however, the action might be initiated by the king or his officers. Cross-suits were not allowed but a suit once initiated could not be withdrawn without the permission of the Court. Detailed rules of pleadings—nature and contents of plaint and defence or reply—were laid down.<sup>14</sup>

The purpose of a trial was frequently described as the ascertainment of the truth. With this purpose in view rules relating to evidence and proof were laid down. Every possible precaution was taken, consistently with the conditions or the knowledge of that time, to secure the discovery of the truth.<sup>15</sup> Means of proof were said to be two-fold; human and divine. Documents, witnesses and possession were the human means of proof,<sup>16</sup> while ordeals of balance, water and others were supposed to be 'divine' means. Though different ordeals were

8. Varadachariar, *The Hindu Judicial System*, p. 80 ; see also Sen Gupta, *Evolution of Ancient Indian Law*, pp. 48-54 ; Harrop A. Freeman, "Hindu Jurisprudence," 8 *Indian Year Book of International Affairs*, 205 (1959).

9. See Maine and Malinowski, quoted in Varadachariar, *The Hindu Judicial System*, pp. 68 ff.

10. Varadachariar, *The Hindu Judicial System*, 108, p. 84 ; Sen Gupta, *Evolution of Ancient Indian Law*, pp. 52-53.

11. Sarkar, *Epochs in Hindu Legal History*, p. 3.

12. Sen Gupta, *Evolution of Ancient Indian Law*, p. 53 ; Sarkar, *ibid.*, p. 14.

13. See Varadachariar, *The Hindu Judicial System*, pp. 135-40.

14. Varadachariar, *ibid.*, pp. 142 ff. ; Kane, 3. *History of Dharma Sastra*, p. 251.

15. Varadachariar, *ibid.*, p. 150.

16. According to Brihaspati : "Witnesses are superior to inference (circumstantial evidence), a document is superior to witnesses, undisturbed possession is superior to all these." Quoted in Kane, 3. *History of Dharma Sastra*, p. 306. See also Jolly, *Hindu Law and Custom*, 308 (1928).

allowed to prove innocence or guilt of the accused, as a general rule 'divine' modes of proof were to be resorted to only in the absence of human means<sup>17</sup>

Judgment could be given after the evidence of both parties had been fully heard and was made in the form of a decree (jyapatra) which was given to the victorious party. The contents of such a decree were meticulously laid down. Once a decision had been given and the decree issued, the case could not be reopened and the principle of *res judicata* applied<sup>18</sup>

1 Later Smritis—Narada, Brihaspati and Katyayana.—Hindu Law reached its pinnacle with Narada (100 A.D. - 400 A.D.) Brihaspati (300 A.D. - 500 A.D.) and Katyayana (400 A.D. - 600 A.D.) All these three jurists exhibited an excellent analytical insight and the most perfect acumen of elaborating and explaining the juristic principles and philosophy.<sup>19</sup> They form in the words of Professor Kane "a triumvirate in the realm of ancient Hindu Law"<sup>20</sup> In their works the whole law, substantive as well as procedural, is dealt with in a scientific and precise manner. Hindu Law reached such a developed stage at their hands that it could be favourably compared with any advanced system of ancient jurisprudence in any part of the world including Roman<sup>21</sup>

While following the general principles of law, such as the divine origin and supremacy of law sanctity of Courts impartiality of judges inviolability of contracts and so on, as laid down by their predecessors, these writers developed the details in regard to their application according to their own genius. Thus Narada subdivided the eighteen titles of law, as described in Manu, into 132 titles and systematized Yajñavalkya's list of Courts by arranging them in the following ascending order kulas (families), srenis (association of merchants) ganas (assemblies), the 'authorized person' and the king. Criminal law was further revised and developed, though, as we have mentioned earlier, it was for Brihaspati to make a clear distinction between crimes and torts. As a general rule, Dr Sarkar tells us "the later the Smriti, the more systematic is the law of crimes and the more exclusive is the treatment between civil law and criminal law"<sup>22</sup>

Commentaries and Digests (Nibandhas), (700 A.D. - 1800 A.D.).—As centuries rolled, there came a time when the productive period, so to say, of Hindu legal history was succeeded by a critical period. While it is impossible to say when the compilation of the metrical Smritis in the name of reputed saints and even of gods ceased, it must have been a long time before the commencement of the commentaries on the Smritis, the earliest of which is found in the eighth century A.D. From then on the entire development of law was made through the numerous commentaries and digests compiled between 800 and 1800 A.D.<sup>23</sup>

17 For a detailed study of these rules of evidence see Kane, 3 *History of Dharma Sastra*, 304 ff., Varadachariar, *The Hindu Judicial System*, pp 151-70, Sen Gupta, *Evolution of Ancient Indian Law*, pp 61 ff., Thakur, *Hindu Law of Evidence* (1933), *Hindu Law and Custom* pp 303 ff., Sarkar, *Epochs in Hindu Legal History*, pp 17 ff.

18 But see a few exceptions to the rule, such as where a decision was obtained through fraud or force dishonesty of the judges incompetency of one of the litigants etc., where a new trial could be ordered. Kane, 3 *History of Dharma Sastra*, 335 ff. Varadachariar, *The Hindu Judicial System*, p 170, Jolly *Hindu Law and Custom* p 316.

19 Sarkar, *Epochs in Hindu Legal History*, p 124.

20 Kane, 1 *History of Dharmasastra* 213 (1930).

21 See Sarkar *Epochs in Hindu Legal History* pp 12-18, Sen *The General Principles of Hindu Jurisprudence* 38 (1918). See for an interesting controversy about the existence or otherwise of lawyers as an institution in Ancient India Jayaswal *Hindu Polity*, 311 (1935), Varadachariar, *The Hindu Judicial System*, p 156. Kane 3 *History of Dharma Sastra* pp 283-90, Sarkar, *Epochs in Hindu Legal History* pp 37, 129.

22 Sarkar, *ibid*, p 141. For detailed treatment of law in these Smritis see Sarkar, *ibid*, pp 123, 162.

23 Sen Gupta, *Evolution of Ancient Indian Law*, p 17.

With the passage of time and before the compilation of commentaries began, *Smritis* had come to acquire a great sanctity. No longer claiming divine authority for themselves the criticisms of commentators and digest-writers could not be of an avowedly aggressive character; they could not and did not disown the authority of the *Dharmasastras*, and their task consisted of interpreting them and reconciling their pronouncements whenever any apparent conflict stared them in the face.<sup>24</sup> Despite these theoretical limitations, however, they modified the law of the *Smritis* to a great extent. Under the guise of exegesis they allowed themselves considerable freedom of legislative amendment. While interpreting the *Smriti* texts, all of which were supposed to constitute a single body of law, they discarded much of what had become obsolete with a simple statement that the old rules were no longer admissible in the present age of sins (*kaliyuga*). Professing to explain they not only explained away but also rebuilt.<sup>25</sup> They modified and supplemented the rules in the *Smritis*, in part by means of their own reasoning and in part in the light of usages that had grown up.

Most of these commentaries and digests, as we have noticed earlier, were composed by men of rank and influence, perhaps by kings and ministers themselves, or atleast under their auspices and by their order.<sup>1</sup> In any case, the study and interpretation of sacred texts was confined to a distinct class of people who carried great prestige on account of their learning and eminence and whose opinions were respected by Courts. Some of these commentaries came to be so well-recognized that they superseded the *Smritis* in a very large measure. The two most important such commentaries are on *Yajnavalkya Smriti* by *Vijnanesvara* author of *Mitakshara*, and *Jimuta-Vahana*, author of the *Dayabhaga*; and India to this day is divided in allegiance between them. The number of commentators and digest-writers is a legion. According to Professor Kane there are more than 4,500 works and more than 2,000 authors.<sup>2</sup> Each of the famous *Smritis*, such as *Manu* and *Yajnavalkya*, have been the subject of numerous commentaries at different times.<sup>3</sup>

Though these commentaries and digests modified the law according to the changed circumstances, the fundamental principles they could not modify or change. They only accepted these basic principles and explained them in greater detail. They accepted the real source of law as *Dharma* or sacred law derived from the *Dharmasastras*, but modified it according to the customs prevailing from time to time.

**Hindu Law During the Muslim Period.**—During the latter part of this period, by the end of the 12th century A.D., Muslims had established their empire in Northern India. By the 16th century the Islamic empire became dominant in the greater part of India and Muslim law became the law of the land. But Hindu Law did not die out. Against the aggressive attitude of the Muslim rulers, Hindus fought by developing a challenging superiority complex. Though suppressed politically, they did not let the rulers defile the sanctity of their homes and castes, social and religious observances. The *Dharmasastras* were given a higher sanctity. Castes divided and subdivided, but remained unmixed. Henceforth the main energy of the Hindus was directed to conserve rather than to

24. Sen, *The General-Principles of Hindu Jurisprudence*, p. 22.

25. Vesey-Fitzgerald, "Hindu Law," *Encyclopaedia of the Social Sciences*, 261 (1937).

1. See Julius Jolly, *Outlines of an History of Hindu Law*, 27-28 (1885).

2. These perhaps include the original *Dharmasastras* as well. Kane, 1. *History of Dharma Sastra*, pp. 503-760.

3. On *Manu*, the most renowned commentaries are those of *Medhatithi* (825-900 A.D.), *Govindaraja* (1100 A.D.-1200 A.D.), *Dharsvara* (1000-1055 A.D.) and *Kulluka* (about 1250 A.D.); on *Yajnavalkya*, those of *Visvarupa* (900 A.D.), *Vijnanesvara* (known as *Mitaksara*) (1200 A.D.), and *Sulapana* (1375-1460 A.D.), *Mitaksara* in its turn has been the subject of several commentaries. See Mayne, *Treatise on Hindu Law*, 42 (1938).

create The traditions became strict and castes were hardened Under the social order which had been developed through the ages most of the social activities were in the hands of autonomous groups outside the sphere of royal authority The villages, more or less self sufficient economic and social units, continued to lead their own lives and local panchayats continued to dispense justice \*

Most of the Muslim kings, busy with political struggles and consolidation of their empires, had little time or opportunity to devote attention to the administration of justice For this reason and in order not to incite the Hindus, they left Hindu personal law undisturbed and uninterrupted and it continued to be applied and enforced by their own panchayats and caste Courts Furthermore, most of the rural areas, comprising a large bulk (about ninety per cent) of the population were ignored and no judicial officers were appointed to administer justice in those areas Most quarrels therefore, did not come within the cognizance of the royal Courts at all and continued to be decided by the panchayats according to their own traditions and customary law \* Even in metropolitan areas, apart from criminal law, law of evidence and contracts, in other civil and religious matters Hindus continued to be governed by the law of the Dharmasastras, and if ever a case came before the State Courts it was referred to Hindu scholars for decision \*

The study of Hindu Law, therefore, did not become extinct during the Muslim period and in the sixteenth century Dalapati, one of the ministers of the well-known Nizari Shah dynasty of Ahmadnagar, wrote an enormous digest of Hindu Law and Todarmulla Finance Minister of the Mughal Emperor Akbar, compiled an encyclopaedic work on Dharmasastra law \*

Apart from the application of Hindu Law to a vast majority of people in Muslim kingdoms Dharmasastras held supreme sway in the Hindu Maratha Empire, established by Shivaji in 1674 which continued to exist in varying forms until 1818.\*

**English Influence.**—There were already two parallel systems of law in India A third system was introduced by the British where they came to acquire power from time to time in the eighteenth century However, it was decided quite early by the British by a Regulation of 1772, the substance of which regulates to this day, that in certain matters namely in "suits regarding inheritance, marriage and caste and other religious usages and institutions," Hindus and Mohamedans were to be governed by their own laws \* In 1781, it was declared that where no specific directions were given the judges were to act "according to justice, equity and good conscience,"\*\* which meant in fact "the rules of English law if found applicable to Indian society and circumstances"\*\*\* This made it possible for the principles of English Common and statute law to become through the decisions of the Courts, the governing law of the country During the latter part of the nineteenth century, principles of English law, with slight modifications needed for Indian conditions, were introduced into the expanding structure of Indian jurisprudence

4 See Munshi's foreword to Majumdar (ed) 5 *The History and Culture of the Indian People*, xxx (1957)

5 See Jolly *Outlines of an History of Hindu Law* (1883) pp 18-20, Husami, *Administration under the Mughols*, 196 ff (1952)

6 Husami, *ibid*

7 Jolly *Outlines of an History of Hindu Law* (1883) pp 18-20, Mayne, *Treatise on Hindu Law* (1938) p 4

8 Sarkar, *Epochs in Hindu Legal History*, pp 268-78.

9 See Mayne, *Treatise on Hindu Law* p 10

10 Raskin, *Background to Indian Law* 2 (1916)

11 Setalvad, *The Common Law in India* 1P (1960)

through a system of codes dealing with important parts of substantive and procedural civil and criminal law.<sup>12</sup>

But the British did not want to touch the personal laws of the Hindus and Muslims. To touch the personal laws, they thought, would mean touching their religion, which was dangerous in the extreme, as the so-called Sepoy Mutiny of 1857 had shown. Expressly recommending the non-codification of the personal laws of the Hindus and Muslims, the Second Law Commission, appointed to codify the Indian Law, stated:

The Hindu Law and the Mahomedan Law derive their authority from Hindu and Mahomedan religion. It follows that as a British legislature cannot make Mahomedan or Hindu religion, so neither can it make Mahomedan or Hindu Law.<sup>13</sup>

Hindu and Muslim Laws, therefore, continued to be applied to the members of the two communities.<sup>13-a</sup> When the British Courts came to expound these personal laws, they followed the previous practice of leaving the determination of a point of law to the Hindu *pundits* or Muslim *maulvis*, as the case may be, who were attached to the Court. Subsequently, in 1864, when the body of case-law had been built up to an extent where it was possible to assume that the judges themselves had a sufficient knowledge of the general principles of the subject, and when a few of the more authoritative text-books had been translated into English, these law-officers were discarded and the Courts continued to administer personal laws all by themselves.<sup>14</sup> This led to the interpretation and modification of personal laws according to English notions of justice and equity. Whenever certain gaps were found in Hindu or Muslim Law, equity found its way in. English ideas and English remedies were wedded to Indian rules. Moreover, the common law was applied under the title of 'justice, equity and good conscience,' which the Courts were authorized to apply in default of a rule in the personal laws. In some cases judges were found invoking 'natural justice' and even Roman Law, where it seemed more suitable than the English common law.<sup>15</sup>

Furthermore, though professedly the British were not in favour of modifying the personal law of the Hindus, as a matter of fact such modification did take place in some parts of Hindu Law. At the persistent insistence of the informed public opinion a few modifications were made in Hindu Law through legislation<sup>16</sup>, though the sum total of these changes was practically negligible. No radical revision of the Hindu Law and society was made and *Dharmasastras* continued to be regarded as supreme and Hindus were guided by the centuries-old *Dharma* law in personal matters.

**Modern Period—Hindu Law Since Indian Independence.**—Thus when the British left India in 1947, India inherited from them a well-tried system of law

12. The following Acts were enacted which still govern the country practically unaltered : Civil Procedure Code, 1859 ; Penal Code, 1860 ; Criminal Procedure Code, 1861 ; Succession Act, 1865 and 1925 (applicable to persons other than Hindus and Muslims) ; Contract Act, 1877 ; Negotiable Instruments Act, 1881 ; Transfer of Property Act, 1882, as amended in 1929 ; Trusts Act, 1882. See Setalvad, *The Common Law in India*, pp. 27 ff.

13. Quoted in Sarkar, *Epochs in Hindu Legal History*, pp. 350-51.

13a. Apart from Hindus and Muslims, other communities in India, such as Portuguese and Armenian Christians, Parsees, Sikhs, Jains, Buddhists and Jews were all governed by their own personal laws.

14. See Derrett, *Hindu Law: Past and Present*, 15 (1958).

15. Derrett *ibid* pp. 18-19.

16. Most important of such legislations were : the Caste Disabilities Removal Act, 1850 ; the Hindu Widow Remarriage Act, 1856 ; Arya Marriage Act, 1937 ; Hindu Wills Act, 1870 ; Indian Succession Act, 1881 ; the Hindu Inheritance Removal of Disabilities Act, 1928 ; the Hindu Women's Right to Property Act, 1937 ; the Child Marriage Restraint Act, 1927 ; the Hindu Gains of Learning Act, 1930.

drawn from English common and statute law and adjusted and modified according to Indian conditions. They also got from the British a wholesome system of administration of justice and a tradition of an independent, impartial and upright judiciary which had brought stability in the society.<sup>17</sup> On becoming her own master once again India not only maintained all that had been useful and to which its people had been accustomed but drew from other countries whatever it found beneficial for its purposes. In 1950 it framed its Constitution and freely and unhesitatingly borrowed from different constitutions of the world their best features but modified them with a view to avoiding the faults that had been disclosed in their working as well as to adopting them to the existing conditions and needs of the country. So as it has been well said, even 'if it is a 'patchwork,' it is a 'beautiful patchwork'.<sup>18</sup> Without going into the details of the Indian Constitution it may be pointed out that the basic elements of the rule of law are all enshrined in it. It not only declares the fundamental rights of the people such as the freedom of speech, of the press, of the right to meet and to any religious faith, the right to question the acts of the Government and its office, and even of the competence of the Parliament, as well as the right to freedom from unlawful arrest and to equal protection of law, but guarantees their enforcement through a fearless, independent and impartial judiciary having the power of judicial review.

The most important and noteworthy change has however, come in the Hindu personal law. In earlier times as we have seen, despite strong belief in the 'divine' nature and immutability of Hindu Law and extreme conservativeness of Hindu society law was changed and modified from time to time, with changes in circumstances through several subtle means. Different Smritis and later commentaries and digests, which record the law of their times are testimony to this evolutionary and progressive nature of Hindu Law. This process of change was however, much slowed down during the Muslim period because the Hindus were engaged at that time in a life-and-death struggle to save their religion, culture and society. All of their energies were devoted to conservation of what they had from the past. This tendency was continued even during the British period and encouraged by the attitude adopted by the British Government. The policy of the British administration to interfere as little as possible with the customs of the population in matters of personal status, family law and succession however well intentioned acted as a brake on progress and retarded a natural line of advancement and development of Hindu society.<sup>19</sup> Professing to respect the 'immemorial laws and customs of the people,' the British rulers helped in the continuation of some of the anachronistic institutions. The centuries old rules of social organization which had become outmoded long long ago continued to have their full force in modern India in spite of the loud calls of the informed public opinion for a change. The piecemeal reformatory legislations passed by the British Government, English remedies provided by the doctrine of 'equity, justice and good conscience' by the British Indian Courts conflicting interpretations put on the Dharmasastra texts by different Courts an innumerable number of local customs and many other factors had all helped to create a pretty confusing picture of law. There was therefore a strong demand for an over all reform and codification of Hindu Law.

In 1941 the British Indian Government appointed a committee under the chairmanship of Sir B. N. Rau to study the question. It was not without a tre

17 See Setalvad, *The Common Law in India* 45 Vivian Bose, 'The Migration of Common Law' 76 *Law Quarterly Review*, 61 ff. (1960)

18 Basu, *Introduction to the Constitution of India* 23 (1960)

19 This was particularly true during the time when the Courts relied on Hindu pundits for answers on questions of Hindu Law. See Lapstein, 'The Reception of Western Law in a Country of a Different Social and Economic Background: India,' 6 *Indian Year Book of International Affairs* 281 282 (1957)

mendous amount of courage and under heavy criticism of not only "traditionalists" and religious groups, but some of the well-meaning and intelligent lawyers, that the Rau Committee suggested the enactment of a Hindu Code. It was not, however, so easy to touch the sacred religious law of more than 87 per cent. of the people, unable to understand the benefits of a codified and simple enactment, and unprepared to give up the 'divine law' propounded by their great sages. The National Government was, however, determined. The result was that the Hindu Code Bill came to be divided in different parts and passed one by one in the form of four different Acts, viz., Hindu Marriage Act, 1955; Hindu Succession Act, 1956; Hindu Minority and Guardianship Act, 1956; and Hindu Adoptions and Maintenance Act, 1956. Despite strong protests of the orthodox and conservatives,<sup>20</sup> in a revolutionary spirit, these enactments have struck down the old outmoded law and modified it and changed it according to the changed spirit of the time. For the first time in Indian history, Dharmasastra law has given way to a new, uniform, clear, and widely understandable legal system, though the present system has its roots in the past and derives its main principles from the age-old dharma law.<sup>21</sup>

**Present Law—A Synthesis of Old and New.**—All these changes in Indian law and Hindu personal law which today is similar to any other modern legal system have been made possible because of the open-mindedness of the Indian mind and its capability to change according to changed circumstances. He not only kept the best in his own traditions but accepted with open arms whatever he found useful in others, brought out a great synthesis and coloured it in his own colour. As the history of India amply proves, it has always shown a tolerance and hospitality for other cultures, even those forced upon her. The result of this spirit has been well summed up by Mr. Seymour Vesey-Fitzgerald on Indian jurisprudence:

The greatest contribution to posterity made by the Hindu tradition was the broad-mindedness, sympathy, and the toleration of different viewpoints exhibited almost alone in India amongst the civilized communities of the earlier days.

The modern Hindu lawyer, regarding his ancient law with patriotic pride, looks upon English law with necessary affection. He would not separate even if he could the two systems of which he is the living synthesis, and in adapting his inherited conceptions to the needs of today, he is merely doing openly and with modern tools what in another age and another fashion was done by the sages and commentators before him.<sup>22</sup>

But as it has been well remarked, it need not be assumed that India's appetite for imported legal principles is exhausted.<sup>23</sup> She will, of course, pick and choose from other systems whatever she feels good for her purposes. Dr. Jayaswal has well said:

The constitutional progress made by the Hindus has probably not been equalled much less surpassed by any polity of antiquity. The great privilege of the Hindu at the same time is that he is not yet a fossil; he is still living with a determination which a great historian (Duncker) has characterized as a tenacity which bends but does not break. The Golden Age of his polity lies not in the past but in the future.<sup>24</sup>

20. See Nanda, "Marriage and Divorce in India: Conflicting Laws," 55 *North-western University Law Review*, 632 (1960), and literature quoted therein.

21. See generally Derrett, "The Codification of Personal Law in India. Hindu Law," 6 *Indian Year Book of International Affairs*, 189-211 (1957).

22. Vesey-Fitzgerald, *Encyclopaedia of Social Sciences* 262 (1937); also quoted by Harrop A. Freeman, "Hindu Jurisprudence," 8 *Indian Year Book of International Affairs*, 213 (1959).

23. Freeman, *ibid.*, p. 213.

24. Jayaswal, *Hindu Polity*, 352 (1955).



Conclusion.—The above story meager and disjointed as it is would seem to show that all through the long history of India attempts were being made to establish a rule of law in that country. The defects and deficiencies sometimes serious are of course to be found. But the reasons for them lie in the political, social and religious history of the country which could not be separated from its legal system.

Despite these weaknesses however the antiquity and excellence of Hindu Law are beyond challenge. The juristic writings of the Hindu lawyers reached a high stage of perfection at a very early date. The Indian law is of course not the same as it was centuries ago. No law can be such. The fate of law is change—constant change with change in society. But the same lofty ideals and high principles can be found in those old law books as they are to be found in the present law. Professor Freeman of Cornell University has well summed up the position by saying that Hindu jurisprudence is not ideologically different from our own (i.e., American Law). He further asserts that

Modern law in all countries is a synthesis of old and new. Western and Eastern that for adequate study we divide law into subjects some of which are deeply rooted in old traditions and culture and some of which are related to but largely replace these traditions. . . . that in many areas no one can tell from what law a given quotation comes. I venture to say that there is no Eastern or Western philosophy and no Eastern or Western law

because the old gives place to the new and the new is ever changing.<sup>25</sup>

Superficial observers may still say the East is the East and the West is the West but deeper insight shows that it is the same universal reason which unfolds itself amidst the diversity of legal conceptions, rules and institutions.<sup>1</sup>

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25 Freeman, *Hindu Jurisprudence*, *8 Indian Year Book of International Affairs*, pp. 213-14.  
 1 See *General Principles of Hindu Jurisprudence* 378 (1916).

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—P.B. GAJENDRAGADKAR, *Chief Justice*, K.N. WANCHOO,  
M. HIDAYATULLAH J.C. SHAH and S.M. SIKRI, JJ.

Gulab Bai and another

.. Appellants\*

v.

Puniya

.. Respondent.

*Guardians and Wards Act (VIII of 1890), sections 25, 47 and 48—Petition under section 25—Order thereon appealable under section 47—Appellate order, finality of—Rajasthan Ordinance (XV of 1949), clause 18.*

Against the order of a single Judge of the Rajasthan High Court reversing in appeal the order of the trial Court and directing the return of the custody of a minor girl to her natural guardian, the appellant herein preferred an appeal under clause 18 of the Rajasthan High Court Ordinance (XV of 1949) which was dismissed as incompetent because of the provisions of sections 47 and 48 of the Act (VIII of 1890). Aggrieved by that order, the appellant preferred the instant appeal to the Supreme Court by Special Leave.

*Held*, the High Court was in error in concluding that the appeal before a Division Bench under clause 18 (1) of the Ordinance was incompetent. Since it is the common ground that the judgment of the single Judge does not fall within the category of the exceptions provided by clause 18 (1) of the Ordinance (XV of 1949) the appeal preferred before the Division Bench against that order cannot be held incompetent under that clause if it is not otherwise incompetent.

Section 47, clause (c) provides that an appeal shall lie to the High Court from an order made by a Court under section 25 (*i.e.*) making or refusing to make an order for the return of a ward to the custody of his guardian. When that appeal, under the Rules of the Rajasthan High Court, was heard by a single Judge, his decision became appealable to a Division Bench of that High Court under clause 18 (1) of the Ordinance.

The construction of section 48, therefore, is that it attaches finality to the orders passed by the trial Court subject to the provisions of section 47 of the Act and section 115 of the Civil Procedure Code. What is made final by section 48 is an order made by the trial Court under one or the other provision of the Act. But the finality so prescribed is subject to section 47 of the Act and old section 622 (now section 115) of the Code of Civil Procedure. The saving clause unambiguously means that the order of the trial Court shall be final except in cases where an appeal is taken under section 47 or the order is challenged in revision under section 115, Civil Procedure Code. The orders in appeal or revision are outside the purview of finality of the orders passed under the Act because they would be final by themselves subject of course to any appeal provided by law or by any constitutional provision as in Article 136.

Appeal by Special Leave from the Order, dated the 4th February, 1964, of the Rajasthan High Court in Division Bench Civil Special Appeal No. 2 of 1963.

*O.P. Varma*, Advocate, for Appellants.

*Mohan Behari Lal*, Advocate, for Respondent.

The Judgment of the Court was delivered by

*Gajendragadkar, C.J.*—This appeal by Special Leave arises from an application made by the respondent Puniya in the Court of the Senior Civil Judge at Jhalawar under section 25 of the Guardians and Wards Act, 1890 (VIII of 1890) (hereinafter called 'the Act'), for the custody of his daughter Mt. Chitra. To this application, the respondent had impleaded the two appellants, Gulab Bai and her husband Onkar Lal. The respondent is a Kumhar by caste, whereas the appel-

lants are Jat. The respondent's case was that the minor Chitra who was about 11 years of age at the date of the application had been living with the appellants for the last 4 or 5 years with his consent. Whilst the minor girl was living with the appellants, she used to come to spend some time with the respondent and his wife, but for some time past, the appellants did not allow Chitra to visit her parents. That is why the respondent thought it necessary to move the Court for an order under section 25 of the Act.

The claim thus made by the respondent was disputed by the appellants. They alleged that the respondent and his wife had lost some children in their infancy and so, they decided to leave the minor in the custody of the appellants in the hope that their custody would save the child. Accordingly, the minor was entrusted to the appellants a few hours after her birth and in fact, she was given away by the respondent and his wife to the appellants to be looked after as if she was their adopted child. During all these years, the appellants have looked after the minor as their own child, have taken fond care of her, and have looked after her education. The appellants and the respondent and his wife are neighbours, and the appellants denied the allegation made by the respondent that they ever obstructed the minor from visiting her parents. According to the appellants recently an unfortunate incident had taken place between appellant No. 1 and the wife of the respondent and that was the real cause of the present application. They pleaded that as a result of the ugly incident that took place between the two ladies, the minor was frightened and appeared to be disinclined to visit her parents any longer.

On these pleadings, the parties led evidence to support their respective contentions. The learned trial Judge held that the child had been entrusted to the appellants soon after she was born, and that she was looked after by the appellants as if she was their daughter. He felt satisfied that in case the child was removed from the homely atmosphere which she enjoyed in the house of the appellants, that would definitely be detrimental to her welfare and would also affect her health, because she had come to look upon the appellants as her parents. The learned trial Judge examined the child in order to ascertain her own wishes, because he thought that she had attained the age of discretion and could express her wishes intelligently. He was convinced that the child definitely preferred to stay with the appellants. Having come to the conclusion that it would be inconsistent with the interests of the child to allow the application made by the respondent, the learned Judge ordered that appellant No. 2 should be appointed the guardian of the person of the minor under sections 7 and 8 of the Act. He directed that the said guardian shall give an undertaking to the Court not to remove the child from the territorial jurisdiction of the Court and not to marry her without the permission of the Court. A direction was also issued that the child shall not, of course, be married outside her caste without the consent of her parents even if she so desires.

Against this order, the respondent preferred an appeal before the Rajasthan High Court. This appeal was heard by a learned single Judge of the said High Court who reversed the decision of the trial Judge. He came to the conclusion that it would be in the interests of the minor to deliver her to the custody of the respondent and his wife. He held that under section 6 (a) of the Hindu Minority and Guardianship Act, 1956, the respondent was entitled to be the guardian of his daughter in the absence of any allegation or proof that he was in any way unsuitable to be such a guardian. The learned single Judge also took into account the fact that the appellants and the respondent belonged to different castes, and he held that since the minor was then about 12 years of age, it was in her interest that she went back to be looked after by her own parents. On this view, the learned single Judge set aside the order passed by the learned trial Judge by which appellant No. 2 was appointed the guardian of the minor and directed him to deliver the minor to the custody of the respondent. The

order passed by the learned Judge further provided that if the appellants did not deliver the minor Chitra to her parents on the expiry of three months, the respondent shall apply for execution of the order and that it would be executed as a decree under section 25 (2) of the Act by issue of a warrant under section 100 of the Code of Criminal Procedure.

Against this decision, the appellants preferred an appeal under clause 18 of the Rajasthan High Court Ordinance, 1949 (XV of 1949) (hereafter called 'the Ordinance'). This appeal was dismissed by a Division Bench of the High Court on the ground that the appeal was incompetent having regard to the provisions of sections 47 and 48 of the Act. The appellants then moved the High Court for certificate to prefer an appeal to this Court, but the said application was dismissed. That is how the appellants applied for and obtained Special Leave from this Court, and it is with the said leave that this appeal has come before us.

The short question of law which arises for our decision is whether the High Court was right in holding that the appeal under clause 18 (1) of the Ordinance was incompetent, and that raises the question about the construction of sections 47 and 48 of the Act.

Before dealing with this point, two relevant facts ought to be mentioned. The Act was extended to Rajasthan by the Part B States (Laws) Act, 1951 (III of 1951) on the 23rd February, 1951, but before the Act was thus extended to Rajasthan, the Ordinance had already been promulgated. Clause 18 (1) of the Ordinance provides, *inter alia*, that an appeal shall lie to the High Court from the judgment of one Judge of the High Court; it excepts from the purview of this provision certain other judgments with which we are not concerned. It is common ground that the judgment pronounced by the learned single Judge of the High Court on the appeal preferred by the respondent before the High Court, does not fall within the category of the exceptions provided by clause 18 (1) of the Ordinance; so that if the question about the competence of the appeal preferred by the appellants before the Division Bench of the High Court had fallen to be considered solely by reference to clause 18 (1), the answer to the point raised by the appellants before us would have to be given in their favour. The High Court has, however, held that the result of reading sections 47 and 48 together is to make the present appeal under clause 18 (1) of the Ordinance incompetent. The question which arises before us is: is this view of the High Court right?

Section 47 of the Act provides that an appeal shall lie to the High Court from an order made by a Court under sections specified in clauses (a) to (j) thereof. Clause (c) of the said section refers to an appeal against an order made under section 25, making or refusing to make an order for the return of a ward to the custody of his guardian. It is thus clear that the order passed by the learned trial Judge in the present proceedings was an order under section 25 of the Act, and as such, is appealable under section 47; and when as a result of the Rules framed by the Rajasthan High Court the present appeal was placed before a learned single Judge of the said High Court for hearing and was decided by him, his decision became appealable to a Division Bench of the said High Court under clause 18 (1) of the Ordinance. Thus far, there is no difficulty or doubt.

But the High Court has held that section 48 of the Act, in substance, amounts to a prohibition against an appeal to a Division Bench under clause 18 (1) of the Ordinance; and that makes it necessary to examine the provisions of section 48 carefully. Section 48 reads thus:—

"Save as provided by the last foregoing section and by section 622 of the Code of Civil Procedure, an order made under this Act shall be final and shall not be liable to be contested by suit or otherwise."

It is clear that what is made final by section 48 is an order made under this Act, and the context shows that it is an order made by the trial Court under one or the other provision of the Act. This position is made perfectly clear if the first part of section 48 is examined. The finality prescribed for the order made under this Act is subject to the provisions of section 47 and section 622 of the earlier Code which corresponds to section 115 of the present Code. In other words, the saving clause unambiguously means that an order passed by the trial Court shall be final, except in cases where an appeal is taken against the said order under section 47 of the Act, or the propriety, validity, or legality of the said order is challenged by a revision application preferred under section 115 of the Code. It is, therefore, essential to bear in mind that the scope and purpose of section 48 is to make the orders passed by the trial Court under the relevant provisions of the Act final, subject to the result of the appeals which may be preferred against them, or subject to the revision applications which may be filed against them. In other words, an order passed on appeal under section 47 of the Act, or an order passed in revision under section 115 of the Code, are strictly speaking, outside the purview of the finality prescribed for the orders passed under the Act, plainly because they would be final by themselves without any such provisions subject, of course, to any appeal provided by law, or by a constitutional provision, as for instance, Article 136. The construction of section 48, therefore, is that it attaches finality to the orders passed by the trial Court subject to the provisions prescribed by section 47 of the Act, and section 115 of the Code. That is one aspect of the matter which is material.

The other aspect of the matter which is equally material is that the provisions of section 47 are expressly saved by section 48, and that means that section 47 will work out in an ordinary way without any restriction imposed by section 48. In considering the question as to whether a judgment pronounced by a single Judge in an appeal preferred before the High Court against one or the other of the orders which are made appealable by section 47 will be subject to an appeal under clause 18 (1) of the Ordinance section 48 will have no restrictive impact. The competence of an appeal before the Division Bench will have to be judged by the provisions of clause 18 itself. Section 48 saves the provisions of section 47, and as we have already indicated, considered by themselves the provisions of section 47 undoubtedly do not create any bar against the competence of an appeal under clause 18 (1) of the Ordinance where the appeal permitted by section 47 is heard by a learned single Judge of the High Court. Therefore, we are satisfied that the High Court was in error in coming to the conclusion that an appeal before a Division Bench of the said High Court under clause 18 (1) of the Ordinance was incompetent.

It is true that in upholding the respondent's plea that the appeal preferred by the appellants under clause 18 (1) of the Ordinance was incompetent, the High Court has no doubt purported to rely upon and apply its earlier decision in the case of *Temple of Shri Bankteshwar Balaji through Rampal v The Collector, Ajmer*<sup>1</sup>. The said decision, however, was concerned with the effect of the provisions prescribed by section 66 (3) of the Ajmer Abolition of Intermediaries and Land Reforms Act (III of 1955) in relation to clause 18 of the Ordinance and since we are not called upon to consider the correctness of the conclusion reached in that behalf, it is unnecessary for us to examine whether the High Court was right in holding that the provisions of the said section 66 (3) created a bar against the competence of the appeal under clause 18 (1) of the Ordinance. All that we are concerned to deal with in the present appeal is the effect of section 48 of the Act, and in our opinion, the High Court was in error in holding that section 48 excluded the application of clause 18 (1) of the Ordinance to the decision of the learned single Judge in the present proceedings.

In this connection, we may incidentally refer to the decision of this Court in *Union of India v. Mohindra Supply Company*<sup>1</sup>. In that case this Court has held that an appeal against the appellate order of the single Judge was barred under section 39 (2) of the Indian Arbitration Act, 1940, because the expression "Second Appeal" in section 39 (2) means a further appeal from an order passed in appeal under section 39 (1) and not an appeal under section 100 of the Code, and as such, the said expression "Second Appeal" includes an appeal under the Letters Patent. In substance, the effect of the decision of this Court in the case of *Mohindra Supply Company*<sup>1</sup> is that by enacting section 39 (2) the Arbitration Act has prohibited an appeal under the Letters Patent against an order passed under section 39 (1). This decision again turned upon the specific words used in section 39 (1) and (2) of the Arbitration Act and is not of any assistance in interpreting the provisions of section 48 of the Act with which we are concerned in the present proceedings.

The question as to whether an appeal permitted by the relevant clause of the Letters Patent of a High Court can be taken away by implication, had been considered in relation to the provisions of section 588 of the Codes of Civil Procedure of 1877 and 1882. The first part of the said section had provided for an appeal from the orders specified by clauses (1) to (29) thereof, and the latter part of the said section had laid down that the orders passed in appeals under this section shall be final. Before the enactment of the present Code, High Courts in India had occasion to consider whether the provision as to the finality of the appellate orders prescribed by section 588 precluded an appeal under the relevant clauses of the Letters Patent of different High Courts. There was a conflict of decisions on this point. When the matter was raised before the Privy Council in *Hurriah Chunder Chowdhury v. Kali Sundari Debia*,<sup>2</sup> the Privy Council thus tersely expressed its conclusions:

"It only remains to observe that their Lordships do not think that section 588 of Act X of 1877, which has the effect of restricting certain appeals, applies to such a case as this, where the appeal is from one of the Judges of the Court to the Full Court."

Basing themselves on these observations, the High Courts of Calcutta, Madras and Bombay had held that section 588 did not take away the right of appeal given by clause 15 of the Letters Patent, vide *Toolsee Money Dassee and others v. Sudevi Dassee and others*<sup>3</sup>, *Sabhapathi Chetti and others v. Narayanasami Chetti*<sup>4</sup>, and *The Secretary of State for India in Council v. Jehangir Maneckji Cursetji*<sup>5</sup> respectively. On the other hand, the Allahabad High Court took a different view, vide *Banno Bibi and others v. Mehdi Hussain and others*<sup>6</sup>, and *Muhammad Naim-ul-lah Khan v. Ishan-Ullah Khan*<sup>7</sup>. Ultimately, when the present Code was enacted, section 104 took the place of section 588 of the earlier Code. Section 104 (1) provides that an appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders. It will be noticed that the saving clause which refers to the provisions of the Code, or to the provisions of any law for the time being in force, gives effect to the view taken by the Calcutta, Madras and Bombay High Courts. In fact, later, the Allahabad High Court itself has accepted the same view in *L. Ram Sarup v. Mt. Kaniz Unmehani*<sup>8</sup>.

We have referred to these decisions to emphasise the fact that even where the relevant provision of section 588 of the earlier Code made certain appellate orders final, the consensus of judicial opinion was that the said provision did not

1. (1962) 2 S.C.J. 179; (1962) 2 M.L.J. (S.C.) 43: (1962) 2 An. W.R. (S.C.) 63: (1962) 3 S.C.R. 497; A.I.R. 1962 S.C. 256.  
2. (1882) L.R. 10 I.A. 4 at 17.  
3. (1899) I.L.R. 26 Cal. 361.  
4. (1902) 1 M.L.J. 346; I.L.R. 25 Mad. 555.  
5. (1902) 4 Bom. L.R. 342.  
6. (1889) I.L.R. 11 All. 375.  
7. (1892) I.L.R. 14 All. 226 (F.B.).  
8. A.I.R. 1937 All. 165.

preclude an appeal being filed under the relevant clause of the Letters Patent of the High Court. In the present case, as we have already indicated, section 48 in terms saves the provisions of section 47 of the Act as well as those of section 115 of the Code, and that gives full scope to an appeal under clause 18 of the Ordinance which would be competent when we deal with the question about appeals under section 47 of the Act considered by itself.

The result is, the appeal is allowed, the order passed by the Division Bench of the High Court dismissing the appeal preferred by the appellants under clause 18 (1) of the Ordinance on the ground that it is incompetent, is set aside, and the said appeal is remitted to the High Court for disposal in accordance with law. In view of the unusual circumstances of this case we direct that parties should bear their own costs incurred so far.

K G S

*Order of Division Bench set aside, Appeal remitted*

## THE SUPREME COURT OF INDIA. (Civil Appellate Jurisdiction)

PRESENT —K. SUBBA RAO, J R MUDHOLKAR AND R S BACHAWAT, JJ

Gadde Venkateswara Rao

*Appellant\**

Government of Andhra Pradesh and others

*Respondents*

*Andhra Pradesh Panchayat Samithis and Zilla Parishads Act (XXXV of 1959), sections 62 and 72—Powers of Government under—Orders under not legally passed—Powers of High Court to issue writ quashing the latter illegal order*

*Constitution of India (1950) Article 226—Discretion of High Court to issue writs under*

Under the auspices of the Block Development Committee Chintalapudi a 'Primary Health Centre' was inaugurated at Dharmajugudem village on 7th November, 1958, but the conditions precedent not being fulfilled it could not be a permanent location. With the concurrence, of the villagers of Dharmajugudem the villagers of Lingapalem through K. V. Krishna Rao complied with the conditions for location of the Centre thereat on 17th July 1959. Thereafter the appellant representing Dharmajugudem villagers on 31st July 1959 also complied with the requisites for locating the Centre in this village. The Block Development Committee, after reviewing the previous history resolved to locate the Centre at Lingapalem and communicated the same to the Government which approved of the same. All this was done on the administrative basis.

The Panchayat Samithis and Zilla Parishads Act came into force in September, 1959, setting up of the Health Centre fell within the powers and functions of Chintalapudi Panchayat Samithi under section 18 of the Act read with the Schedule thereto and the matter was directed by the Government to be taken up by the Samithi. The Samithi resolved at its meeting held on 28th May 1960 that the Health Centre be located at Dharmajugudem and communicated the same to the Government. The Government approved the proposal of the Samithi on 6th July 1960. On 23rd January 1961 Rules were framed under section 69 of the Act.

A representation was made to the Government that the meeting of the Panchayat Samithi held on 28th May 1960, was irregular for want of proper notice but the Government decided not to act under section 72. Thereafter at a Special Meeting of the Samithi held on 12th May 1961 the Samithi cancelled all the resolutions passed at the prior meeting. At a subsequent meeting held on 29th May 1961 the Samithi resolved to locate the Health Centre at Lingapalem and communicated the resolution to the Government.

The Government made an order on 7th March 1962 holding there was no valid reason for shifting the Centre from Dharmajugudem to Lingapalem and directing the Block Development Officer to take action accordingly. This order was made on the basis that the location once made

\* C.A. No. 755 of 1965.

permanent cannot be set aside later except by a two-thirds majority ; the Government later discovering that Dharmajigudem was only a temporary location reviewed its order of 1962 and passed a later order on 18th April, 1963, sanctioning the permanent location at Lingapalem.

The appellant, a representative of Dharmajigudem village filed a petition under Article 226 of the Constitution for quashing the later order of 1963 ; it was heard by a single Judge who dismissed it. On appeal the High Court confirmed the dismissal. Hence the appeal to the Supreme Court.

The points arising for decision are : (i) whether the appellant had a personal right to maintain the writ petition ; (ii) whether the orders of the Government, dated 7th March, 1962, was made under section 62 and valid ; (iii) whether the order, dated 18th April, 1963, was void as the order under section 62 could not be reviewed under section 72 and it is also otherwise not legal.

*Held*, The petition under Article 226 is maintainable. A personal right need not be a proprietary right ; it can also relate to the interest of a trustee. The appellant is the representative of a committee which was in law the trustees of the amount collected for a public purpose the Health Centre to be established. He was certainly prejudiced by the order of 1963.

Section 62 (1) of the Act empowers the Government, by order in writing, to cancel any resolution passed by a Panchayat Samithi, if that resolution is passed in excess or abuse of its powers under the Act etc. ; but before taking action under the sub-section it should give notice to the Samithi concerned. The order of 1962 was therefore passed under this provision. No notice was given to the Samithi before taking action ; the order is not therefore, one legally passed.

Section 72 (1) confers a general power on the Government and on its terms if there were no other provision it can cancel a resolution of the Panchayat Samithi under this provision. Even then notice has to be given to any party who might be prejudicially affected thereby ; the proviso requires such notice.

Sub-section (3) of section 72 enables the Government to review its own order, *suo motu* or on application made to it if the order was passed under a mistake of fact or law, etc. Notice as provided for in the proviso to sub-section (1) is necessary for such a review. Otherwise the order on review is not legal and valid. Further this power to review its own order can be exercised only in respect of orders made under sub-section (1). It cannot be exercised in respect of orders under section 62.

Therefore the order of the year 1963 is bad for two reasons, (i) it was passed without notice to the petitioner (appellant) who is affected prejudicially, (ii) it was in review of an order passed under section 62 of the Act.

The argument that the order of 1962 was not one passed under section 62 but one passed in the exercise of powers under the Rules which vests the power of deciding the location of the Centre in the Government in case of dispute cannot be accepted. Section 18 confers the powers on the Samithi and not on the Government ; and the power, if conferred by the Rules, is inconsistent with the provisions of the Act and so the Rules are bad.

If the order of 1963 is bad, it is bad in fact, and the High Court quashed that order it would have restored an illegal order, that of 7th March, 1962. The High Court has, therefore, rightly refused to exercise its extraordinary discretionary power in the circumstances of the case.

Appeal by Special Leave from the Judgment and Order, dated the 7th September, 1964, of the Andhra Pradesh High Court in Writ Appeal No. 8 of 1964.

*S. T. Desai*, Senior Advocate, (*N. V. Suryanarayana Murthy*, *R. Thiagarajan* and *K. Jayaram*, Advocates, with him), for Appellant.

*P. Ram Reddy* and *A. V. Rangam*, Advocates, for Respondent No. 1.

*S. V. Gupte*, Solicitor-General of India (*A. V. V. Nair*, Advocate, with him), for Respondent No. 4.

The Judgment of the Court was delivered by

*Subba Rao, J.*—This is an appeal by Special Leave against the judgment of a Division Bench of the Andhra Pradesh High Court in a Letters Patent Appeal



confirming that of a single Judge of that Court dismissing a petition filed by the appellant under Article 226 of the Constitution for issuing a writ of *certiorari* quashing the order of the Government of Andhra Pradesh, dated 18th April, 1963, under section 72 of the Andhra Pradesh Panchayat Samithis and Zilla Parishads Act, 1959 (XXXV of 1959) hereinafter called the Act

At the outset it will be convenient to survey the facts leading up to this appeal in their chronological order. For the promotion of rural welfare, the Government of Andhra Pradesh initiated Community Development Programme in the said State Pursuant to that programme, each district in the State was divided into Blocks, called Community Development Blocks Chintalapudi Taluk in the West Godavari District was one of such Blocks A Block Planning and Development Committee was appointed for each Block and a District Planning and Development Committee for each district All this was done by the Government by issuing administrative directions, indeed the said Committees were only advisory bodies and the ultimate power vested in the Government One of the activities of the said Committees was to constitute Primary Health Centres in each district On 22nd March 1957, the Government of Andhra Pradesh issued a notification laying down broad principles for guidance in the selection of places for the location of Primary Health Centres One of the said principles relevant to the present enquiry may be noticed at this stage and that is, the village selected for locating such Centre was expected to give 2 acres of site free and 50 per cent cash contribution which would not be less than Rs 10,000 On April 8, 1958, the Block Planning and Development Committee, Chintalapudi, resolved unanimously, modifying its earlier resolution, to have the Primary Health Centre at Dharmajugudem village as there were High Schools and education facilities there On 7th November 1958, the Collector of the District formally inaugurated the Primary Health Centre at Dharmajugudem On 11th July, 1959, the said Committee passed two resolutions, among others Under resolution 3 it recorded with appreciation the donation of 50 cents of land by Achyutharamaiah, the Block Committee Member, towards site for the Primary Health Centre to be located at Dharmajugudem and appealed to the members of the Block Committee to see to the remittance of the cash contribution of Rs 10,000 immediately Presumably because that something happened at the meeting immediately after the said resolution was passed indicating that there would be no response in that direction, another resolution was passed by the said Committee recording that as the villagers of Dharmajugudem had failed to pay the said contribution for the last 8 months the Primary Health Centre located in that place be shifted to and established permanently at any other suitable village where land and cash contributions were forthcoming. On 13th July, 1959, i.e., two days after the aforesaid resolution, the Block Development Officer wrote a letter to the appellant, who was the President of the Village Panchayat, informing him that he had not taken any steps for the realization of the contribution so far and that if the required contribution was not realized before the end of the month steps would be taken to shift the Primary Health Centre to some other place It may be noticed at this stage that the Block Development Officer, who had to implement the resolution of the Committee, had outstepped his powers in writing a letter in derogation of the terms of the resolution of the Committee dated 11th July, 1959 On 16th July, 1959 the appellant and others of Dharmajugudem informed the Block Development Officer that it was not possible for them to collect the amount and that there was no objection to the shifting of the Centre from their village to any other place On 11th July, 1959, the Block Development Officer wrote to the people of Dharmajugudem that as they were unable to pay the said amount the said Centre would be shifted to Lingapalem On 27th July, 1959, the 4th respondent, Rangarao, representing Lingapalem village, deposited Rs 10,000 with the Block Development Committee and also donated two acres of land for the purpose of locating the said Centre in the said village On

31st July, 1959, on behalf of Dharmajigudem, Venkateswara Rao, the appellant, deposited the sum of Rs. 10,000 in the Sub-Treasury and K. V. Krishna Rao donated 2 acres of land and delivered possession of the same to the Block Development Officer. On 14th August, 1959, the said Committee, after reviewing the previous history of the location of the Primary Health Centre and after noticing that both the villages deposited the amount—one on 27th July, 1959 and the other on 31st July, 1959—and after considering the competing claims, resolved unanimously to have the Primary Health Centre located permanently at Lingapalem and to request the authorities concerned to shift it from Dharmajigudem to Lingapalem at an early date. One important fact to be noticed in this resolution is that it was recorded therein that the representatives of Dharmajigudem assured the representatives of Lingapalem that they not only gave up their efforts to have the Primary Health Centre at Dharmajigudem but also unanimously agreed to have it located at Lingapalem. It was further recorded therein that the villagers of Lingapalem paid up the entire contribution enthusiastically and that too after obtaining the concurrence of the villagers of Dharmajigudem and also on an assurance that the latter gave up the idea of having the Primary Health Centre at Dharmajigudem. It would, therefore, be noticed that this resolution for locating the Primary Health Centre at Lingapalem was passed after the representatives of the two villages settled their disputes. On September 18, 1959, the Act came into force and under section 3 thereof a Panchayat Samithi was constituted for Chintalapudi. On 7th January, 1960, the Government informed the Collector of West Godavari District that the question of shifting the Primary Health Centre from Dharmajigudem to Lingapalem should be left to the decision of the Panchayat Samithi constituted under the Act. The President of the Panchayat Samithi, Chintalapudi Block, was requested to place the resolution, dated 14th August, 1959, of the Block Planning and Development Committee before the Panchayat Samithi for reconsideration and submit a report to the Government through the Chairman, Zilla Parishad, West Godavari. It may be noticed that after the passing of the Act, what was being done administratively was sought to be placed on a statutory basis. On 28th May, 1960, the Chintalapudi Panchayat Samithi held its meeting and resolved that the Primary Health Centre should be permanently located at Dharmajigudem; and the said resolution was communicated to the Government. On 6th July, 1960, the Government approved the proposal of the Chintalapudi Panchayat Samithi to locate the Primary Health Centre permanently at Dharmajigudem. On 23rd January, 1961, the Rules framed by the Government in exercise of the powers conferred on it under section 69 of the Act came into force. On 22nd February, 1961, on a representation made to the Government that the meeting of the Panchayat Samithi held on 28th May, 1960, was irregular on the ground of inadequate notice, the Government decided not to interfere with those proceedings under section 72 of the Act. On 12th May, 1961, the Panchayat Samithi at a special meeting, on the ground that the meeting held on 28th May, 1960, was not held in accordance with rule 4 (1) of the Rules for the conduct of business, in exercise of the power given to it under rule 15 thereof, cancelled all the resolutions passed by the meeting of the Samithi on 28th May, 1960. On 29th May, 1961, the Samithi passed another resolution adopting all the resolutions which it cancelled on 12th May, 1961, except the resolution to locate the Primary Health Centre at Dharmajigudem. In regard to the location of the said Centre it resolved to locate it at Lingapalem. On 7th March, 1962, the Government made an order holding that there was no valid reason for shifting the Primary Health Centre from Dharmajigudem to Lingapalem and directing the Block Development Officer to take action accordingly. The main reason given for that order was that the Primary Health Centre was already functioning at Dharmajigudem and a Health Centre once established should not be shifted to another place within the Block unless the Panchayat Samithi resolved by two-thirds majority of the members present at the meeting as required under rule 7 of the Rules and that the resolution, dated 29th May, 1961, was not

supported by the requisite majority. On 18th April 1963 i.e., about a year after the earlier order, the Government passed another order wherein it held that it passed the previous order, dated 7th March, 1962, on a mistaken impression that it was a case of shifting the Primary Health Centre from one place where it was permanently located to another, while the correct position was that in the instant case the Primary Health Centre was not permanently located by the Government and, therefore, the resolution passed by the Panchayat Samithi on 29th May, 1961, fell within rule 2 of the Rules and not under rule 7 thereof. In that view, it directed that the said Centre should be located permanently in Lingapalem village in accordance with the resolution of the Panchayat Samithi, dated 29th May, 1961.

A resume of the said facts leads to the following factual position. Before the Act came into force, the Primary Health Centre was inaugurated at Dharmajugudem presumably subject to the condition that the said village would comply with the conditions laid down by the administrative directions governing the location of a Centre. One of the important conditions was that the village seeking to have the Centre should give 2 acres of land free and 50 per cent cash contribution which would not be less than Rs. 10,000. The said amount was not paid by Dharmajugudem village with the result the condition was not complied with. With the consent of the representatives of the village of Dharmajugudem, the Block Planning and Development Committee resolved to shift the Primary Health Centre from Dharmajugudem to Lingapalem. The Lingapalem village satisfied the conditions on 27th July, 1959. Thereafter, Dharmajugudem village also satisfied the said conditions on 31st July, 1959. On 14th August, 1959 the said Committee by a resolution decided to locate the Centre at Lingapalem, but the Government directed the matter to be decided by the Panchayat Samithi as by that time the Act had come into force and the Panchayat Samithi for the Block had been established. Though on 28th May, 1960, the Panchayat Samithi at first resolved to have the Centre at Dharmajugudem and though the said resolution was approved by the Government, the said Panchayat Samithi finally by its resolution, dated 29th May, 1961, cancelled its earlier resolution and resolved to locate the Centre at Lingapalem. On 7th March, 1962, under section 62 of the Act the said resolution of the Panchayat Samithi was set aside by the Government on the ground that it did not get the requisite support of two-thirds majority. But on 18th April, 1963, the Government reviewed its previous order, under section 72 of the Act, on the ground that the said order was made under a mistaken impression that the Primary Health Centre was permanently located at Dharmajugudem and directed the Centre to be located at Lingapalem. It will, therefore, be seen that though the Health Centre was formally inaugurated at Dharmajugudem before the Act came into force, there was not and could not have been a permanent location of the Centre at that place as the condition precedent was not complied with. After the Act came into force, though the Panchayat Samithi at first approved of the location of the Centre at Dharmajugudem it cancelled the resolution and decided to locate it at Lingapalem. The Government, on a misapprehension of fact set aside that order but when it came to know of the mistake it revoked its earlier order and directed the location of the Centre at Lingapalem. The question is whether on these facts the Government had jurisdiction to make the order which it did in exercise of its powers under section 72 of the Act.

The appellant, who was the representative of the village of Dharmajugudem in all the said proceedings, filed an application before the High Court under Article 226 of the Constitution for quashing the said order of the Government. The said application was in the first instance heard by a single Judge of the High Court and he dismissed it. On appeal, a Division Bench of the High Court confirmed it. Hence the appeal.

Mr. Desai, learned Counsel for the appellant, raised before us the following points: (1) The order of the Government concerning the resolution, dated 29 May, 1961, was made under section 62 of the Act and, therefore, the said order could not be reviewed under section 72 thereof. (2) Assuming that the said order, dated 7th March, 1962, was made under section 72 (3) of the Act, the order, dated 18th April, 1963, reviewing the said order was invalid inasmuch as the pre-requisite for the exercise of the power of review thereunder, namely the existence of a mistake of fact or law or the ignorance of any material fact, was not satisfied. (3) The order, dated 18th April, 1963, was also invalid, because it was made without giving an opportunity to the party prejudiced thereby of making a representation against the making of the said order.

Mr. Ram Reddi, learned Counsel for the State of Andhra Pradesh, raised a preliminary objection that the appellant had no personal right in the matter of the location of the Primary Health Centre and, therefore, he had no *locus standi* to file application under Article 226 of the Constitution. He argued that the order of the Government, dated 7th March, 1962, was not simply a cancellation of a resolution made by the Panchayat Samithi, but a composite order giving directions to the Block Development Officer and, therefore, it fell directly within the scope of section 72 of the Act; and, as the said order was made under a misapprehension that there was a permanent location of the Health Centre at Dharmajigudem, the Government had jurisdiction to review the same under section 72 (3) of the Act. He would further contend that if the order, dated 7th March, 1962, was passed under section 62 of the Act, the said order being an administrative one, the Government had jurisdiction to review the same under section 62 itself when the mistake was discovered or brought to its notice. In addition he raised before us a new point which was not argued either before the single Judge or, on appeal, before the Division Bench of the High Court. He would say that the impugned order was neither made under section 62 nor under section 72 of the Act, but it was really passed under the relevant Rules made by the Government in exercise of the power conferred on it under section 69 of the Act, read with sub-section (2) of section 18 thereof, whereunder the ultimate authority under the Act to locate the Health Centre was the Government, though on the recommendation of the Panchayat Samithi. In this view, the argument proceeded, no question of review would arise at all, for the Government passed the final order in regard to the location of the Primary Health Centre at Lingapalem.

The learned Solicitor-General, appearing for the 4th respondent, supported Mr. Ram Reddi on all the points and further elaborated that aspect of the argument which related to the construction of the order made by the Government on 7th March, 1962.

The first question is whether the appellant had *locus standi* to file a petition in the High Court under Article 226 of the Constitution. This Court in *The Calcutta Gas Company (Proprietary) Ltd. v. The State of West Bengal*<sup>1</sup>, dealing with the question of *locus standi* of the appellant in that case to file a petition under Article 226 of the Constitution in the High Court, observed:

"Article 226 confers a very wide power on the High Court to issue directions and writs of the nature mentioned therein for the enforcement of any of the rights conferred by Part III or for any other purpose. It is, therefore, clear that persons other than those claiming fundamental right can also approach the Court seeking a relief thereunder. The Article in terms does not describe the classes of persons entitled to apply thereunder; but it is implicit in the exercise of the extraordinary jurisdiction that the relief asked for must be one to enforce a legal right. . . . . The right that can be enforced under Article 226 also shall ordinarily be the personal or individual right of the petitioner himself, though in the case of some of the writs like *habeas corpus* or *quo warranto* this rule may have to be relaxed or modified."

Has the appellant a right to file the petition out of which the present appeal has arisen? The appellant is the President of the Panchayat Samithi of Dharmaji-

gudem The villagers of Dharmajugudem formed a committee with the appellant as President for the purpose of collecting contributions from the villagers for setting up the Primary Health Centre. The said committee collected Rs 10,000 and deposited the same with the Block Development Officer. The appellant represented the village in all its dealings with the Block Development Committee and the Panchayat Samithi in the matter of the location of the Primary Health Centre at Dharmajugudem. His conduct, the acquiescence on the part of the other members of the committee, and the treatment meted out to him by the authorities concerned support the inference that he was authorized to act on behalf of the committee. The appellant was, therefore, a representative of the committee which was in law the trustees of the amounts collected by it from the villagers for a public purpose. We have, therefore, no hesitation to hold that the appellant had the right to maintain the application under Article 226 of the Constitution. This Court held in the decision cited *supra* that "ordinarily" the petitioner who seeks to file an application under Article 226 of the Constitution should be one who has a personal or individual right in the subject matter of the petition. A personal right need not be in respect of a proprietary interest; it can also relate to an interest of a trustee. That apart, in exceptional cases, as the expression "ordinarily" indicates, a person who has been prejudicially affected by an act or omission of an authority can file a writ even though he has no proprietary or even fiduciary interest in the subject matter thereof. The appellant has certainly been prejudiced by the said order. The petition under Article 226 of the Constitution at his instance is, therefore, maintainable.

Now, we shall first take the new argument advanced by Mr. Ram Reddy for the first time before us, for, if that was accepted, the appeal would fail. Briefly stated, his contention was that the order of the Government dated 18th April, 1963, was not made either under section 62 or under section 72 of the Act, but was made only under the Rules made by the Government in exercise of its power under section 69 of the Act. To appreciate this contention it will be useful to notice the relevant rules.

Under rule 2, the Panchayat Samithi only recommends to the Government the place for locating the said Centre. Under rule 3 (11), in the case of conflict between the relevant authorities in regard to the location of a Health Centre, the Government's order shall be final. Under rule 6, a Primary Health Centre once established shall not ordinarily be shifted to another place except by the Government on the recommendation of the Panchayat Samithi on the basis of a resolution passed by it by two thirds of the members of the Panchayat Samithi present at the meeting. Even in such a case the Government has no power to direct the shifting of a Primary Health Centre established in one place to another, if the contribution from the people had been accepted and is in deposit. It is clear from the said rules that the ultimate authority to locate the Primary Health Centre or to direct its shifting from one place to another is the Government. On the basis of the said rules, learned Counsel contended that the High Court missed the real point, presumably on the arguments advanced before it, and proceeded to consider the validity of the impugned order in terms of section 72 of the Act. The circumstance, the argument proceeded, that the Government in its orders referred neither to section 62 nor to section 72 of the Act or did not give any notice to parties as prescribed thereunder clearly indicates that the Government acted only under the said relevant rules. This argument so stated appears at the first blush to be unanswerable. But a scrutiny of the relevant provisions of the Act shows that the said rules are inconsistent with the provisions of the Act and they cannot possibly override the statutory power conferred on the Panchayat Samithi. Under section 18 (1) of the Act, subject to the provisions of the Act, the administration of the Block shall vest in the Panchayat Samithi and under sub-section (2) thereof the Panchayat Samithi shall exercise the powers and perform the functions specified in the Schedule. When we refer to the Schedule it will be

seen that the following entry is found under the heading "Health and Rural Sanitation", "Establishing and maintaining Primary Health Centre and Maternity Centres". It is manifest that under the Act the statutory power to establish and maintain Primary Health Centres is vested in the Panchayat Samithi. There is no provision vesting the said power in the Government. Under section 69 of the Act, the Government can only make Rules for carrying out the purposes of the Act; it cannot, under the guise of the said Rules, convert an authority with power to establish a Primary Health Centre into only a recommendatory body. It cannot, by any rule, vest in itself a power which under the Act vests in another body. The Rules, therefore, in so far as they transfer the power of the Panchayat Samithi to the Government, being inconsistent with the provisions of the Act, must yield to section 18 of the Act.

Realizing this difficulty, the learned Solicitor-General, who appeared for the 4th respondent, made an attempt to reconcile the relevant rules with the provisions of section 18 of the Act. He argued that section 18 of the Act conferred a power on the Panchayat Samithi to establish and maintain Primary Health Centres, whereas the Rules provided for the location or shifting of the Centres. This argument does not appeal to us. A Primary Health Centre cannot be established *in vacuo*; it must be established in some place. The Rules deprive the Panchayat Samithi of the power to select a place for establishing a Primary Health Centre and make it a recommendatory body with final powers in the Government. The Rules also confer a power on the District Medical Officer and the District Health Officer in the matter of location of the Centre and give the Government the final voice, if there is any conflict between those officers and the Panchayat Samithi. Even in regard to shifting of the Primary Health Centre, the Government's voice is final under the Rules. It is one thing to say that the exercise of the power by the Panchayat Samithi is regulated by the Rules, but another thing to deprive it of that power in the matter of location of the Primary Health Centre and confer the said power on the Government. We, therefore, hold that the Rules, in so far as they make the Panchayat Samithi a mere recommendatory body, are inconsistent with the Act. This may be the reason why in the High Court the Government did not think fit to sustain the order under the authority of the Rules.

The next question is whether the order, dated 18th April, 1963, can be sustained under section 72 of the Act. Section 72 of the Act reads:

*Power of revision and review by Government :*

(1) The Government may, either *suo motu* or on an application from any person interested call for and examine the record of a Panchayat Samithi or a Zilla Parishad or of their Standing Committees in respect of any proceeding to satisfy themselves as to the regularity of such proceeding or the correctness, legality or propriety of any decision or order passed therein; and, if, in any case, it appears to the Government that any such decision or order should be modified, annulled or reversed or remitted for reconsideration, they may pass orders accordingly :

Provided that the Government shall not pass any order prejudicial to any party unless such party has had an opportunity of making a representation.

(2) \* \* \* \* \*

(3) The Government may *suo motu* at any time or on an application received from any person interested within ninety days of the passing of an order under sub-section (1), review any such order if it was passed by them under any mistake, whether of fact or of law, or in ignorance of any material fact. The provisions contained in the proviso to sub-section (1) and in sub-section (2) shall apply in respect of any proceeding under this sub-section as they apply to a proceeding under sub-section (1)."

Sub-section (1) of section 72 of the Act confers a wide power on the Government to revise any decision or order passed in any proceeding under the Act. Sub-section (3) thereof confers a power on the Government to review the order made under sub-section (1) thereof if it was passed by the Government under any mistake, whether of fact or of law, or in ignorance of any material fact. To attract sub-section (3), the order sought to be reviewed should have been made

under sub-section (1) To appreciate the scope of section 72 (1) of the Act, it is necessary to compare the said sub-section with section 62 of the Act. Under section 62 (1), the Government, may, by order in writing, cancel any resolution passed by a Panchayat Samithi, if in its opinion such resolution is not legally passed or is in excess or abuse of the powers conferred by or under the Act or for any other reasons mentioned therein. Under sub-section (2) of section 62, the Government shall, before taking action under sub-section (1) thereof give the Panchayat Samithi or the Zilla Parishad, as the case may be, an opportunity for explanation. Section 72 confers a general power on the Government, and on its terms, if there was no other section, it can cancel a resolution of a Panchayat Samithi. But section 62 of the Act confers a special power on the Government to cancel a resolution passed by a Panchayat Samithi in the circumstances mentioned therein. The principle *generalia specialibus non derogant* compels us to exclude from the operation of section 72 the case provided for under section 62. If so construed, it follows that if the order reviewed fell under the scope of section 62, it could not be reviewed under section 72, for section 72 (3) enables the Government only to review an order made under sub-section (1) of section 72. So, the learned Counsel for the State as well as for the 4th respondent made a serious effort to bring the order of the Government, dated 7th March, 1962, within the terms of section 72 (1) of the Act. As the argument turns upon the terms of the said order, it may conveniently be read at this stage.

### GOVERNMENT OF ANDHRA PRADESH

#### Planning and Local Administration Department

MEMORANDUM NO 1354/Prog 11/61 2, dated 7th March, 1962

Sub Community Development Programme—Chuntalapudi Block—Shifting of Primary Health Centre from Dharmajugudem to Lingapalem—Orders issued

Ref 1 Representation of Sri C. Punneswararao and others dated 31st June, 1961

2 Letter from Collector, West Godavari, No 015642/61, dated 22nd September, 1961

The Panchayat Samithi, Chuntalapudi, at its meeting held on 25th August, 1960, unanimously resolved to locate the Primary Health Centre at Dharmajugudem. Later, the Panchayat Samithi at its meeting held on 29th May, 1961 resolved to shift the Primary Health Centre permanently to Lingapalem village. The President Dharmajugudem Panchayat, and others have represented to Government against acceptance of the resolution passed by the Samithi at its meeting held on 29th May, 1961. This representation has been carefully examined by the Government in consultation with the Collector, West Godavari.

Under rule 6 of the Rules for the establishment and maintenance of Primary Health Centres by Panchayat Samithis made under the provisions of the Panchayat Samithis and Zilla Parishads Act, 1959 the Primary Health Centre once established shall not ordinarily be shifted to another place within the Block unless the Samithi resolves by 2/3rd majority of the members present at the meeting as required under rule 7 of the said Rules. In the present case the Primary Health Centre was already functioning at Dharmajugudem and the resolution of the Panchayat Samithi dated 29th May, 1961, did not get the requisite support of the Samithi Members as required under rule 7. In the above circumstances, the Government consider that there are no valid reasons for shifting the Primary Health Centre from Dharmajugudem to Lingapalem. The Block Development Officer, Chuntalapudi, is directed to take action accordingly.

(Sd) B. PRATAP REDDI

Deputy Secretary to Government

It was said that the said order did not mention the section whereunder it was passed, that it did not cancel any resolution, that it did not in terms approve or disapprove any resolution, that it considered other orders issued and finally gave a direction to the Block Development Officer to take action in accordance with the terms of the order. In short, the argument of the learned Counsel was that the order was not for the cancellation of the resolution of the Panchayat Samithi but one made in terms of section 72 of the Act. We are not impressed by this

argument. The preamble to the order clearly mentions that the Panchayat Samithi, Chintalapudi, at its meeting held on 29th May, 1961, resolved to shift the Primary Health Centre permanently to Lingapalem village. Then it states that the President of the Dharmajigudem Panchayat and others had represented to the Government against the acceptance of the said resolution. The order then records that the Government had carefully considered the said representations. Then it gives the reason that the said resolution was bad inasmuch as that under rule 6 of the Rules the Primary Health Centre once established should not ordinarily be shifted to another place within the Block, unless the Panchayat Samithi resolves by two-thirds majority of the members of the Samithi present at the meeting as required by rule 7 of the Rules. Then it points out that the Primary Health Centre was functioning at Dharmajigudem, and, therefore, the resolution, not having the support of the requisite majority, did not comply with rule 7 of the Rules. For the said reasons the order concludes that there were no valid reasons for shifting the Primary Health Centre from Dharmajigudem to Lingapalem. The Government then gives the consequential directions to the Block Development Officer to take action accordingly. An analysis of the order demonstrates beyond any reasonable doubt that it is nothing more than a cancellation of the resolution passed by the Panchayat Samithi on 29th May, 1961. The mere fact that the order does not use the expression "cancel" will not make it any the less an order cancelling the resolution. We, therefore, hold that the order of the Government, dated 7th March, 1962, was one made under section 62 of the Act and, therefore, it could not be reviewed under section 72 thereof.

The learned Counsel for the State then contended that the order, dated 18th April, 1963, could itself be sustained under section 62 of the Act. Reliance is placed upon section 13 of the Madras General Clauses Act, 1891, whereunder if any power is conferred on the Government, that power may be exercised from time to time as occasion requires. But that section cannot apply to an order made in exercise of a quasi-judicial power. Section 62 of the Act confers a power on the Government to cancel or suspend the resolution of a Panchayat Samithi, in the circumstances mentioned therein, after giving an opportunity for explanation to the Panchayat Samithi. If the Government in exercise of that power cancels or confirms a resolution of the Panchayat Samithi, *qua* that order it becomes *functus officio*. Section 62, unlike section 72, of the Act, does not confer a power on the Government to review its orders. Therefore, there are no merits in this contention.

Before we leave section 62 of the Act, it may be noticed that the order, dated 7th March, 1962, was passed by the Government without giving notice to the Panchayat Samithi. It was in violation of the mandatory provision of sub-section (2) of section 62 which says that the Government shall, before taking action under sub-section (1), give the Panchayat Samithi an opportunity for explanation. This opportunity was not given and, therefore, that order was not legal.

Now let us assume that the said order was made under sub-section (1) of section 72 of the Act. Two objections were raised against the validity of the order reviewing the previous order, namely, (i) there was no mistake of fact or law, and (ii) the said order, which was prejudicial to Dharmajigudem village, was made without giving an opportunity to the representatives of the said village of making a representation. The order gives *in extenso* the history of the dispute between Dharmajigudem and Lingapalem in the matter of location of the Primary Health Centre. It points out that all the earlier resolutions of the Panchayat Samithi were cancelled and the only outstanding resolution was that of 29th May, 1961, whereunder the said Centre was directed to be located permanently at Lingapalem. Then it proceeds to say that the order, dated 7th March, 1962, was passed on a mistaken impression that it was a case of shifting the Primary Health Centre from one place where it was permanently located to



another, while the correct position was that the place where the Primary Health Centre was to be located permanently had not till then been decided by the Government. In that view, in supersession of the order, issued by it on 7th March 1962, it directed that the said Centre should be located permanently at Lingapalem as per the resolution of the Panchayat Samithi, dated 29th May, 1961. No doubt the statement in that order, namely, that the place where the Primary Health Centre was to be located permanently had not so far been decided by the Government, if taken out of context, may appear to be an incorrect statement, for the Government by its order, dated 6th July, 1960, approved the proposal of the Panchayat Samithi, Chintalapudi, to locate the Primary Health Centre permanently at Dharmajugudem. But an analysis of the various orders passed by the Panchayat Samithi and the Government discloses, as we have already indicated, that the Primary Health Centre was never permanently located at Dharmajugudem, that before the Act it was located therein subject to certain conditions which were not fulfilled, that after the Act the Panchayat Samithi, though it passed a resolution on 28th May, 1960, approving the location of the said Centre permanently at Dharmajugudem and though it was approved by the Government by its order, dated 6th July, 1960, cancelled its earlier resolution in accordance with law on 29th May, 1961 and voted for locating the Centre at Lingapalem. Therefore, the Government was right when it said in its order that it made a mistake of fact in passing its earlier order on 7th March, 1962, on a misapprehension that there was a permanent location of the Centre at Dharmajugudem.

But there is another flaw in the order of the Government, dated 18th April 1963, *i.e.*, it made the order without giving an opportunity to the representatives of Dharmajugudem who were prejudicially affected by the said order. Learned Counsel for the State said that the appellant could not be considered to be a party prejudicially affected by that order. But, as we have stated earlier, the appellant was the President of the Committee which collected the amount, he was representing the village all through and he also deposited the prescribed amount with the Block Development Officer. The Government should have, therefore, given notice either to him or to the Committee, which was representing the village all through for the purpose of securing the location of the Primary Health Centre in their village. The order made in derogation of the proviso to sub-section (1) of section 72 of the Act is also bad.

The result of the discussion may be stated thus. The Primary Health Centre was not permanently located at Dharmajugudem. The representatives of the said village did not comply with the necessary conditions for such location. The Panchayat Samithi finally cancelled its earlier resolutions which they were entitled to do and passed a resolution for locating the Primary Health Centre permanently at Lingapalem. Both the orders of the Government, namely, the order, dated 7th March 1962, and that, dated 18th April, 1963, were not legally passed—the former, because it was made without giving notice to the Panchayat Samithi, and the latter, because the Government had no power under section 72 of the Act to review an order made under section 62 of the Act and also because it did not give notice to the representatives of Dharmajugudem village. In those circumstances, was it a case for the High Court to interfere in its discretion and quash the order of the Government, dated 18th April, 1963? If the High Court had quashed the said order, it would have restored an illegal order—it would have given the Health Centre to a village contrary to the valid resolutions passed by the Panchayat Samithi. The High Court, therefore, in our view, rightly refused to exercise its extraordinary discretionary power in the circumstances of the case.

In the result, the appeal is dismissed, but, in the circumstances of the case, without costs.

K G S

*Appeal dismissed*

## THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—MR. JUSTICE K. N. WANCHOO, MR. JUSTICE J. R. MUDHOLKAR  
AND MR. JUSTICE S. M. SIKRI, JJ.

Bhikari

.. Appellant\*

v.

State of Uttar Pradesh

.. Respondent.

*Penal Code (XLV of 1860), section 84 and Evidence Act (I of 1872), section 105—Illustration (a)—Scope—Defence of insanity—Onus.*

There is no doubt that the burden of proving an offence is always on the prosecution and that it never shifts. It would, therefore, be correct to say that intention, when it is an essential ingredient of the offence, has also to be established by the prosecution. But the state of mind of a person can ordinarily only be inferred from circumstances. Thus if a person deliberately strikes another with a deadly weapon, which according to the common experience of mankind is likely to cause an injury and sometimes even a fatal injury depending upon the quality of the weapon and the part of the body on which it is struck, it would be reasonable to infer that what the accused did was accompanied by the intention to cause a kind of injury which in fact resulted from the act. In such a case the prosecution must be deemed to have discharged the burden which rested upon it to establish an essential ingredient of the offence, namely the intention of the accused inflicting a blow with a deadly weapon. Section 84 of the Indian Penal Code can no doubt be invoked by a person for nullifying the evidence adduced by the prosecution by establishing that he was at the relevant time incapable of knowing the nature of the act or that what he was doing was either wrong or contrary to law. Now it is not for the prosecution to establish that a person who strikes another with a deadly weapon was incapable of knowing the nature of the act or of knowing that what he was doing was either wrong or contrary to law. Every one is presumed to know the natural consequences of his act. Similarly every one is also presumed to know the law. These are not facts which the prosecution has to establish. It is for this reason that section 105 of the Evidence Act places upon the accused person the burden of proving the exception upon which he relies.

If upon the evidence adduced in the case whether by the prosecution or by the accused a reasonable doubt is created in the mind of the Court as regards one or more of the ingredients of the offence including *mens rea* of the accused he would be entitled to be acquitted.

*Dahyabhai Chhanganbhai Thakkar v. State of Gujarat, A.I.R. 1964 S.C. 1569, referred to.*

Appeal by Special Leave from the Judgment and Order dated 2nd July, 1964, of the Allahabad High Court in Criminal Appeal No. 356 of 1964 and Ref. No. 15 of 1964.

*S. P. Varma*, Advocate (at State expense), for Appellant.

*O. P. Rana*, Advocate, for Respondent.

The Judgment of the Court was delivered by

*Mudholkar, J.*:—The appellant has appealed from the judgment of the High Court at Allahabad affirming his conviction for offences under sections 302, 307 and 324, Indian Penal Code, and confirming the sentence of death passed upon him in respect of the offence under section 302 and also affirming the sentences passed in respect of the other two offences.

The facts as found by the High Court are these :

The appellant had quarrelled with Mangali, P.W. 1, as Mangali reprimanded him over the grazing of his cattle in Mangali's field and damaging his crops. The appellant threatened Mangali that he would exterminate the latter's family. On 25th February, 1957, at about 3-00 P.M. Babu Ram, son of Mangali, aged about 7 or 8 years, Ram Ratia, aged about 2 years, daughter of Mangali's brother and Punna, son of Baijnath, brother of Mangali and Dulli, daughter of one Ladda Kewat, aged about 10 or 11 years and some other children were playing in the village near the hut of Hiralal, P.W. 3. The appellant came there armed with a sickle and rushed

at the children. He first struck a blow on Babu Ram who fled away and started crying. Mangali's one year old daughter Lachhmina was also there at that time and the appellant ripped open that child's chest with the sickle as a result of which she died almost immediately. The appellant then struck blows on Ram Ratia and also on Punna. Hiralal the brother of the appellant who was sleeping in his hut was awakened by the cries of the children and rushed out to save them.

Thereupon the appellant struck a blow on Hiralal as well. Hearing the cries of children a number of villagers rushed to the spot but the appellant escaped from their clutches by running towards the river Ganges which is at a distance of about 75 paces from the place of the incident, jumped into the water and swam to the other shore and absconded. On 11th October, 1957, proceedings under sections 87 and 88 of the Code of Criminal Procedure were started against him and he was eventually proceeded against as an absconder. It was only on 1st February, 1963 that he was arrested and thereafter sent up for trial. At that trial he was convicted and sentenced as already stated.

The only point urged by Mr. Verma who appears for the appellant is that the appellant was a person of unsound mind and that he was not in a position to know or realise the nature of the acts which he was committing. Learned Counsel argued that *mens rea* being an essential ingredient of all the offences with which the appellant was charged his conviction with respect to any of them cannot be sustained for the simple reason that no intention to cause death or to cause any injury whether resulting in death or not could possibly be attributed to a person who when he committed the acts was insane. Similar arguments appear to have been addressed before the Sessions Judge as well as the High Court even though in his examination under section 324 of the Code of Criminal Procedure the appellant did not plead the defence of insanity.

Section 84 of the Penal Code, one of the provisions in Chapter IV of the Penal Code which deals with General Exceptions, provides as follows:

*Act of a person of unsound mind*—Nothing is an offence which is done by a person who at the time of doing it by reason of unsoundness of mind is incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law.

Under section 105 of the Indian Evidence Act, 1872 the burden of proving the existence of circumstances bringing the case within any of the exceptions specified in the Penal Code lies upon the accused person. It further provides that in such a case the Court shall presume the absence of such circumstances. *Illustration (a)* to that provision runs as follows—

A accused of murder alleges that, by reason of unsoundness of mind he did not know the nature of the Act.

The burden of proof is on A.

Learned Counsel however relies upon a decision of this Court in *Dahyabhai Chhaganbhai Thalkar v. State of Gujarat*<sup>1</sup> and contends that it is for the prosecution to establish the necessary *mens rea* of the accused and that even though the accused may not have taken the plea of insanity or led any evidence to show that he was insane when he committed an offence of which intention is an ingredient the prosecution must satisfy the Court that the accused had the requisite intention. There is no doubt that the burden of proving an offence is always on the prosecution and that it never shifts. It would therefore be correct to say that intention, when it is an essential ingredient of an offence, has also to be established by the prosecution. But the state of mind of a person can ordinarily only be inferred from circumstances. Thus if a person deliberately strikes another with a deadly weapon which according to the common experience of mankind is likely to cause an injury and sometimes even a fatal injury depending upon the quality of the weapon and the part of the body on which it is struck, it would be reasonable to infer that what the accused did was accompanied by the intention to cause a kind of injury which in fact resulted from the act. In

such a case the prosecution must be deemed to have discharged the burden which rested upon it to establish an essential ingredient of the offence, namely the intention of the accused inflicting a blow with a deadly weapon. Section 84 of the Indian Penal Code can no doubt be invoked by a person for nullifying the evidence adduced by the prosecution by establishing that he was at the relevant time incapable of knowing the nature of the act or that what he was doing was either wrong or contrary to law. Now it is for the prosecution to establish that a person who strikes another with a deadly weapon was incapable of knowing the nature of the act or of knowing that what he was doing was either wrong or contrary to law. Every one is presumed to know the natural consequences of his act. Similarly every one is also presumed to know the law. These are not facts which the prosecution has to establish. It is for this reason that section 105 of the Evidence Act places upon the accused person the burden of proving the exception upon which he relies. Mr. Varma, however, relies upon the following passage occurring in the aforementioned judgment of this Court :—

“ The doctrine of burden of proof in the context of the plea of insanity may be stated in the following propositions : (1) The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite *mens rea* and the burden of proving that always rests on the prosecution from the beginning to the end of the trial. (2) There is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by section 84 of the Indian Penal Code : the accused may rebut it by placing before the Court all the relevant evidence—oral, documentary or circumstantial, but the burden of proof upon him is no higher than that rests upon a party to civil proceedings. (3) Even if the accused was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the Court by the accused or by the prosecution may raise a reasonable doubt in the mind of the Court as regards one or more of the ingredients of the offence, including *mens rea* of the accused and in that case the Court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged ”

and contends that according to the decision of this Court the legal position is otherwise.

This passage does not say anything different from what we have said earlier. Undoubtedly it is for the prosecution to prove beyond reasonable doubt that the accused had committed the offence with the requisite *mens rea*. Once that is done a presumption that the accused was sane when he committed the offence would arise. This presumption is rebuttable and he can rebut it either by leading evidence or by relying upon the prosecution evidence itself. If upon the evidence adduced in the case whether by the prosecution or by the accused a reasonable doubt is created in the mind of the Court as regards one or more of the ingredients of the offence including *mens rea* of the accused he would be entitled to be acquitted. This is very different from saying that the prosecution must also establish the sanity of the accused at the time of commission of the offence despite what has been expressly provided for in section 105 of the Evidence Act.

Mr. Varma further contends that there is evidence on record from which it can be inferred that the appellant was a person of unsound mind. In the first place, he points out, that no man in his senses will go on attacking children indiscriminately and go to the length of ripping open the chest one year old child. He then refers to the statement of Dulli, P.W. 6 and that of Hiralal, P.W. 3 in which the appellant is referred to as *pagalwa* and also to the specific statement of the former to the effect that the appellant was insane when he attacked the children. It seems to us that the indiscriminate manner in which the appellant attacked three innocent children and particularly his act of ripping open the chest of Lachhminia only shows the brutality of the assailant and cannot reasonably be regarded as a circumstance from which it could be inferred that he was of unsound mind. As regards the reference to the appellant as *pagalwa* by the two witnesses we must point out two relevant facts. In the first place Hiralal is the brother of the appellant while Dulli, as she herself admits, belongs to the family of the appellant. Both are therefore interested in the appellant. Neither of them had on earlier occasions ever mentioned that the appellant was called *pagalwa* by the villagers or that any one shouted when the appellant killed Lachhminia that she was killed by the *pagalwa*. As Dulli herself admits, it was

for the first time that she came out with this statement in cross examination. Similarly it was for the first time in the cross examination that she stated that the appellant was insane when he committed the crime. It is because of this that the prosecution was allowed to cross-examine her. Similarly Hiralal, after making the particular statement was, at the request of the prosecution, declared hostile and cross-examined. The earlier statements made by him which would give a lie to what he had stated in favour of the appellant at the trial were denied by him but the denial was false. In these circumstances the learned Sessions Judge disbelieved that part of the evidence of these two witnesses which tended to suggest that the appellant was a person of unsound mind and was known as such in the village.

Mr Varma then relies on the following observations made by the learned Sessions Judge and says that in view of these observations it would appear that the learned Sessions Judge entertained a doubt about the sanity of the appellant and that therefore, the benefit of that doubt must be given to him. The statement runs thus:

"I am conscious of the fact that the standard of proof required from the accused for the proving of his (sic) insanity at the time of commission of the crime is not the standard of proof required from the prosecution but it is for the defence to prove that insanity existed at the time of commission of the crime and this burden cannot be discharged merely by creating a doubt about his insanity."

We find it difficult to construe these observations of the learned Sessions Judge to mean what learned Counsel says they mean. Immediately after the statement which we have quoted occurs the following in the judgment of the learned Sessions Judge:

"The defence must establish certain circumstances either by its own evidence or by the prosecution evidence from which the existence of insanity can reasonably be inferred. The mere statement of hostile witnesses that he was insane cannot be accepted as sufficient evidence for the proof of the existence of the insanity."

All that the learned Sessions Judge meant by saying "by creating a doubt" evidently was that by merely *trying* to throw doubt about his sanity at the relevant time an accused person cannot be said to discharge the burden of proving that he was insane.

Apart from that, as the learned Sessions Judge has himself pointed out the way in which the appellant used to conduct himself before the incident the manner in which he acted during the incident and his subsequent conduct show, on the other hand, that he was perfectly sane. We can do no better than quote the relevant portion of the judgment of the learned Sessions Judge:

"In the present case there is evidence that up to the time of occurrence he has been doing his cultivation. There is no evidence on record to prove the characteristic of his habit from which it could be concluded that he was acting like an insane man. Before the commission of crime he did not beat any person. On the other hand few months before the occurrence the accused admittedly picked up quarrel with Mangali and Bhैया Lal and had given threatening to make their family indistinct. An insane person could not have done so and it is not expected that he would have continued his cultivation properly like a sane person. Further on the date of occurrence many children were playing including her own cousin sister. But first of all he gave a sickle blow only to Babu Ram and other children of the family of Mangali and Bhैया Lal and not to any other children. This shows that he did not act under the influence of insanity but only with some previous deliberation and preparation. It is further in evidence that he had given threatening to the witnesses. He beat Hira Lal only when he tried to stop the act of beating of the children of Mangali and Bhैया Lal's family with whom he had picked up quarrel previously. Lastly a sense of fear prevailed in him and that is why he acted like a sane man by running and then escaping by jumping into the Ganges river. So, in my view all these circumstances lead to one conclusion that he was not insane and had acted like a sane man and with some motive."

We entirely agree with these observations of the learned Sessions Judge and also with the conclusion arrived at by him that the case of the appellant does not fall under the exception created by section 84 of the Indian Penal Code. In the result we dismiss the appeal and affirm the conviction and sentences passed on the appellant in respect of each of the three offences for which he was found guilty by the learned Sessions Judge.

K.S.

*Appeal dismissed*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, J. C. SHAH AND R. S. BACHAWAT, JJ.

Nawab Usmanali Khan

.. Appellant\*

v.

Sagar Mal

.. Respondent.

*Registration Act (XVI of 1908), section 17—Award—When requires registration.**Arbitration Act (X of 1940)—Award stating that the existing documents relating to debts obtained on lands would remain as before and remain as securities till repayment—If requires registration under—Registration Act (XVI of 1908), section 17.**Civil Procedure Code (V of 1908), sections 86 (1) and 87-B—Consent of Central Government—If necessary for proceedings against ex-Ruler under section 14 of the Arbitration Act (X of 1940).**Civil Procedure Code (V of 1908), section 60 (1) (g)—Political pension—If includes privy purse given to ex-Ruler.*

An award in respect of debts incurred by the Ruler of former Indian State of Jaora stated that the existing documents relating to debts obtained on lands would remain as before, and they would remain as securities till payment of the debts and the debtor could have no right to transfer the land. The award was signed by the Arbitrator and the parties. In proceedings under section 14 of the Arbitration Act for filing the award in Court for passing a decree thereon.

*Held :* (1) The award stated an existing fact, it did not create or of its own force declare any interest in any immovable property. Consequently it did not come within the purview of section 17 of the Registration Act and was not required to be registered.

(2) A proceeding under section 14 read with section 17 of the Arbitration Act, 1940 for the passing of a judgment and decree on the award does not commence with a plaint or a petition in the nature of a plaint and cannot be regarded as a suit and the parties to whom the notice of the filing of the award is given under section 14 (2) cannot be regarded as "sued in any Court otherwise competent to try the suit" within the meaning of section 86 (1) read with section 87-B of the Code of Civil Procedure. Accordingly, the institution of this proceeding against the Ruler of a former Indian State is not barred by section 86 (1) read with section 87-B. Section 141 of the Code does not attract the provisions of section 86 (1) read with section 87-B to the proceedings under section 14 of the Arbitration Act. Section 41 of the Arbitration Act does not carry the matter further. Though no consent to the institution of the proceedings had been given by the Central Government the Court was competent to entertain the proceedings under section 14 of the Arbitration Act and to pass a decree against the Ruler of a former Indian State in those proceedings. The ex-ruler is not now a Ruler of a Sovereign State and cannot claim immunity from proceedings other than suits under the rules of International Law.

(3) The periodical payment of money by the Government to a Ruler of a former Indian State as privy purse on political considerations and under political sanctions and not under a right legally enforceable in any municipal Court is strictly a political pension within the meaning of section 60 (1) (g) of the Code of Civil Procedure. The use of the expression "privy purse" instead of the expression "pension" is due to historical reasons. The privy purse satisfies all the essential characteristics of a political pension and as such, is protected from execution under section 60 (1) (g) Code of Civil Procedure.

Appeals from the Judgment and Order, dated 10th October, 1960, of the Madhya Pradesh High Court, Indore Bench, Indore, in Civil Miscellaneous Appeals Nos. 33, of 1958 and 81 and 82 of 1957.

G. S. Pathak, Senior Advocate, (B. Dulla, Advocate, and J. B. Dadachanji, O.C. Mathur and Ravinder Narain, Advocates of M/s. J. B. Dadachanji & Co., with him), for Appellant.

B. R. L. Iyenger, S. K. Mehta and K. L. Mehta, Advocates, for Respondent.

The Judgment of the Court was delivered by

*Bachawat, J*—The appellant is the Ruler of the former Indian State of Jaora. He had money dealings with the respondent. By an agreement dated 23rd February, 1957, the appellant and the respondent agreed to refer their disputes regarding those dealings to the arbitration of Lala Durgashankar. On the same date, the arbitrator made an award. By this award, the arbitrator found that as sum of Rs. 1,60,000 was due to the respondent from the appellant, and directed that this sum would be payable in eight quarterly instalments: the first four instalments to be of Rs. 21,000 each and the next four instalments to be of Rs. 19,000 each, the amount of interest would be payable in another quarterly instalment, the respondent would have a first charge on the sums receivable by the appellant from the Government of India as privy purse and would be entitled to realise those sums under a letter of authority issued by the appellant and if the Government would raise any objection to the payment, the respondent would have the right to realise the dues from the personal property of the appellant. Some of the items of the loans in respect of which the award was made were secured on lands and ornaments. The award therefore provided:

"The documents relating to debts obtained on lands and ornaments shall remain as before till the payment of the debts and they shall also remain as securities till then and the Nawab Sahib shall have no right to transfer the land."

The award was signed by the arbitrator and also by the appellant and the respondent.

On the same day, the arbitrator filed the award in the Court of the District Judge Ratlam. Notice of the filing of the award under section 14 of the Indian Arbitration Act, 1940 was duly served on the parties. On 9th March, 1957, an agent of the appellant filed a written submission accepting the award and requesting the Court to pass a decree in terms of the award. But on the same day, an application was made by another agent of the appellant intimating that steps would be taken for setting aside the award. The Court fixed 23rd March, 1957, for filing the objection. The time was subsequently extended up to 2nd April, 1957. On that day, an application was filed on behalf of the appellant praying for setting aside the award. But on 5th April, 1957, an application was filed on behalf of the appellant withdrawing the objections and asking the Court to pass a decree in terms of the award, subject to the modification that the amount of the award would be payable in quarterly instalments of Rs. 13,000 each. This application was signed by the respondent in token of his consent to the modification of the amount of the instalments. On 30th April, 1957, the arbitrator filed the relevant papers. On the same day, an agent of the appellant filed an application praying for setting aside the compromise and the award. The case was fixed for hearing on 19th June, 1957. On that date, the Court received by registered post an application from the appellant withdrawing the objections and praying for an order in accordance with the compromise application filed on 5th April, 1957. In the circumstances, on 19th June, 1957, the Court recorded the compromise and passed a decree in terms of the award as modified by the compromise. The appellant filed in the Madhya Pradesh High Court Appeal No. 81 of 1957 under section 39 of the Indian Arbitration Act, 1940 against the order dated 19th June, 1957, treating it as an order refusing to set aside the award. The appellant also filed Appeal No. 82 of 1957 under Order 43 (1) (m) of the Code of Civil Procedure against the order dated 19th June, 1957, recording the compromise.

In the meantime, the respondent started Execution Case No. 5 of 1957, and on 9th September, 1957, obtained an *ex parte* order for transfer of the decree to the Court of the District Judge, Delhi. On 1st November, 1957, the Central Government gave a certificate under section 86 (3) read with section 87-B of the Code of Civil Procedure, 1908 consenting to the execution of the decree against the properties of the appellant. On 8th November, 1957, the District Judge, Delhi passed a prohibitory order under Order 21, rule 46 of the Code of Civil Procedure in respect of sums payable to the appellant on account of the privy purse. By letter dated 26th December, 1957, the Central Government informed the appellant of the prohibitory order. On 3th January, 1958, the appellant applied to the Court of the District Judge, Ratlam, praying for vacating the order of transfer of the decree and for cancellation of the

certificates issued under Order 21, rule 6 (b) of the Code of Civil Procedure. By order dated 15th March, 1958, the Court recalled the decree and cancelled the certificate as prayed for, on the ground that the amount receivable by the appellant on account of his privy purse was not attachable. The respondent preferred Appeal No. 33 of 1958 before the High Court against this order. By another order dated 7th January, 1959, the District Judge, Ratlam dismissed certain objections of the appellant filed in Execution Case No. 2 of 1958. We are informed that the appellant filed before the High Court Appeal No. 13 of 1959 from this order.

Appeals Nos. 81 and 82 of 1957, 33 of 1958 and 13 of 1959 were heard and disposed of by the High Court by a common judgment on 10th October, 1960. The High Court dismissed Appeal Nos. 81 and 82 of 1957 and 13 of 1959 preferred by the appellant and allowed Appeal No. 33 of 1958 preferred by the respondent. The appellant has preferred to this Court Civil Appeal No. 568 of 1963 against the order of the High Court passed in Appeal No. 33 of 1958. He has also preferred Civil Appeal No. 767 of 1963 from the order of the High Court passed in Appeals Nos. 81 and 82 of 1957. Civil Appeals Nos. 568 and 767 of 1963 were heard together, and are being disposed of by this common judgment.

On behalf of the appellant, Mr. Pathak raised three contentions only. He argued that (1) the award affected immovable property of the value of more than Rs. 100 and as it was not registered, no decree could be passed in terms of the award; (2) the proceedings under section 14 of the Indian Arbitration Act, 1940 were incompetent in the absence of the consent of the Central Government under section 86 (1) read with section 87-B, Code of Civil Procedure and the decree passed in those proceedings is without jurisdiction and null and void; and (3) the amount receivable by the appellant from the Central Government as his privy purse is a political pension within the meaning of section 66 (1) (g), Code of Civil Procedure, and is not liable to attachment or sale in execution of the decree. These contentions are disputed by Mr. Iyengar on behalf of the respondent. The first two contentions of Mr. Pathak arise in Civil Appeal No. 767 of 1963 and the third contention arises in Civil Appeal No. 568 of 1963.

The first contention raised by Mr. Pathak must be rejected. The award stated that the existing documents relating to debts obtained on lands would remain as before, and they would remain as securities till payment of the debts and the appellant would have no right to transfer the land. This portion of the award stated an existing fact. It did not create, or of its own force declare any interest in any immovable property. Consequently, the document did not come within the purview of section 17, of the Indian Registration Act, 1908, and was not required to be registered.

The second contention of Mr. Pathak raises questions of construction of sections 86 and 87-B of the Code of Civil Procedure. By reason of section 86 (1) read with section 87-B, no Ruler of any former Indian State "may be sued in any Court otherwise competent to try the suit except with the consent of the Central Government." Section 86 (2) provides that the requisite consent may be given with respect to a specified suit or with respect to several specified suits or with respect to all suits of any specified class or classes. Section 86 plainly deals with a special class of suits, and this conclusion is reinforced by the heading of Part IV, "Suits in Particular Cases", in which sections 86 and 87-B appear. Order 4, rule 1, Code of Civil Procedure provides that every suit shall be instituted by presenting a plaint to the Court or such other officer as it appoints in this behalf. In the context of section 176 of the Government of India Act, 1935, Mahajan and Mukherjea, JJ., observed that the expression "sue" means the "enforcement of a claim or civil right by means of legal proceedings", see *Province of Bombay v. K. S. Advani and others*<sup>1</sup>. But in the context of the Indian Limitation Act, 1908, Lord Russell of Killowen observed in *Hansraj Gupta v. Official Liquidator, Dehra Dun Mussoorie Electric Tramway Co.*<sup>2</sup>:

1. (1950) S.C.J. 451 : (1950) 2 M.L.J. 703 : 2. L.R. (1932) 60 I.A. 13, 19 : 64 M.L.J. 403 (1950) S.C.R. 621, at pp. 661, 697. (P.G.).



The word 'suit' ordinarily means and apart from some context must be taken to mean, a civil proceeding instituted by the presentation of a plaint

And construing section 86 of the Code of Civil Procedure, Shah, J, speaking on behalf of this Court observed in *Bhagwat Singh v State of Rajasthan*<sup>1</sup>

'The appellant is recognised under Article 366 (22) of the Constitution as a Ruler of an Indian State but section 86 in terms protects a Ruler from being sued and not against the institution of any other proceedings which is not in the nature of a suit. A proceeding which does not commence with a plaint or petition in the nature of a plaint or where the claim is not in respect of dispute ordinarily triable in a civil Court would *prima facie* not be regarded as falling within section 86 Code of Civil Procedure

Now, a proceeding under section 14 read with section 17 of the Indian Arbitration Act, 1940 for the passing of a judgment and decree on an award does not commence with a plaint or a petition in the nature of a plaint, and cannot be regarded as a suit and the parties to whom the notice of the filing of the award is given under section 14 (2) cannot be regarded as 'sued in any Court otherwise competent to try the suit', within the meaning of section 86 (1) read with section 87 B, Code of Civil Procedure. Accordingly, the institution of this proceeding against the Ruler of a former Indian State is not barred by section 86 (1) read with section 87 B. Section 141, Code of Civil Procedure does not attract the provisions of section 86 (1) read with sections 87 B to the proceedings under section 14 of the Indian Arbitration Act. Section 86 (1) read with section 87 B confers upon the Rulers of former Indian States substantive rights of immunity from suits. Section 141 makes applicable to other proceedings only those provisions of the Code which deal with procedure and not those which deal with substantive rights. Nor does section 41 (a) of the Indian Arbitration Act, 1940 carry the matter any further. By that section, the provisions of the Code of Civil Procedure, 1908 are made applicable to all proceedings before the Court under the Act. Now, by its own language section 86 (1) applies to suits only and section 141, Code of Civil Procedure does not attract the provisions of section 86 (1) to proceedings other than suits. Accordingly, by the conjoint application of section 41 (a) of the Indian Arbitration Act and sections 86 (1) and 141 of the Code of Civil Procedure, the provisions of section 86 (1) are not attracted to a proceeding under section 14 of the Indian Arbitration Act, 1940. It follows that the Court was competent to entertain the proceedings under section 14 of the Indian Arbitration Act, 1940 and to pass a decree against the appellant in those proceedings, though no consent to the institution of those proceedings had been given by the Central Government. A Sovereign foreign State and a Ruler of such State may enjoy a wider immunity from legal proceedings other than suits under the rules of International Law recognised by our Courts, but the appellant is not now a Ruler of a Sovereign State, and cannot claim immunity from proceedings other than suits. The second contention of Mr Pathak must, therefore, be rejected.

The third contention of Mr Pathak raises the question whether an amount payable to a Ruler of a former Indian State as privy purse is a political pension within the meaning of section 60 (1) (g), Code of Civil Procedure. The word 'pension' in section 60 (1) (g), Code of Civil Procedure implies periodical payments of money by the Government to the pensioner. See *Nawab Bahadur of Murshidabad v Karnam Industrial Bank, Ltd*<sup>2</sup>. And in *Bishambhar Nath v Nawab Imdad Ali Khan*<sup>3</sup>, Lord Wiston observed

"A pension which the Government of India has given a guarantee that it will pay, by a treaty obligation contracted with another sovereign power appears to their Lordships to be in the strictest sense a political pension. The obligation to pay as well as the actual payment of the pension must, in such circumstances be ascribed to reasons of State policy

Now, the history of the integration and the ultimate absorption of the Indian States and of the guarantee for payment of periodical sums as privy purse to the Rulers of the former Indian States are well known. Formerly Indian States were semi-sovereign vassal States under the suzerainty of the British Crown. With the

<sup>1</sup> A.I.R. 1964 S.C. 444 at pp 445-446 and 220

<sup>2</sup> 61 M.L.J. 208 L.R. 1931 53 L.A. 215 29

<sup>3</sup> (1890) L.R. 17 I.A. 161 186.

declaration of Independence, the paramountcy of the British Crown lapsed as from 15th August, 1947, and the Rulers of Indian States became politically independent sovereigns. The Indian States parted with their sovereignty in successive stages, firstly on accession to the Dominion of India, secondly on integration of the States into sizeable administration units and on closer accession to the Dominion of India, and finally on adoption of the Constitution of India and extinction of the separate existence of the States and Unions of States. During the second phase of this political absorption of the States, the Rulers of the Madhya Bharat States including the Ruler of Jaora State entered into a covenant on 22nd April, 1948, for the formation of the United States of Gwalior, Indore and Malwa (Madhya Bharat). By Article II of the covenant, the covenanting States agreed to unite and integrate their territories into one State. Article VI provided that the Ruler of each Covenanting State shall not later than 1st July, 1948, make over the administration of the State to the Rajpramukh and thereupon all rights, authority and jurisdiction belonging to the Ruler and appertaining or incidental to the Government of the State would vest in the United State of Madhya Bharat. Article XI (1) provided that "the Ruler of each Covenanting State shall be entitled to receive annually from the revenues of the United State for his privy purse the amount specified against that Covenanting State in Schedule I." In Schedule I, a sum of Rs. 1,75,000 was specified against the State of Jaora. Article XI (2) provided that the amount of the privy purse was intended to cover all the expenses of the Ruler and his family including expenses of his residence, marriage and other ceremonies and neither be increased nor reduced for any reason whatsoever. Article XI (3) provided that the Rajpramukh would cause the amount to be paid to the Ruler in four equal instalments at the beginning of each quarter in advance. Article XI (4) provided that the amount would be free of all taxes whether imposed by the Government of the United States or by the Government of India. Article XIII of the covenant secured to the Ruler of each Covenanting State all personal privileges, dignities and titles then enjoyed by them. Article XIV guaranteed the succession, according to law and custom, to the *gaddi* of each Covenanting State and to the personal rights, privileges, dignities and titles of the Ruler. The Covenant was signed by all the Rulers of the Covenanting States. At the foot of the Covenant, it was stated that "The Government of India hereby concur in the above covenant and guarantee all its provisions." In confirmation of this consent and guarantee, the covenant was signed by a Secretary to the Government of India.

On the coming into force of the Constitution of India, the territories of Madhya Bharat became an integral part of India. Article 291 of the Constitution provided :

"Where under any covenant or agreement entered into by the Ruler of any Indian State before the commencement of this Constitution, the payment of any sums, free of tax, has been guaranteed or assured by the Government of the Dominion of India to any Ruler of such State as privy purse—

- (a) such sums shall be charged on, and paid out of, the Consolidated Fund of India ; and
- (b) the sums so paid to any Ruler shall be exempt from all taxes on income."

In view of the guarantee by the Government of the Dominion of India to the Ruler of Jaora State in the covenant for the formation of the United State of Madhya Bharat, the payment of the sums specified in the covenant as privy purse to the Ruler became charged on the Consolidated Fund of India, and became payable to him free from all taxes on income. Article 362 provided that in the exercise of the legislative and executive powers, due regard shall be had to the guarantee given in any such covenant as is referred to in Article 291 with respect to the personal rights, privileges and dignities of the Ruler of an Indian State. Article 363 (1) provides that notwithstanding anything contained in the Constitution, the Courts would have no jurisdiction in any dispute arising out of any provision in any covenant entered into by any Ruler of an Indian State to which the Government of the Dominion of India was a party, or in any dispute in respect of any right accruing under or any liability or obligation arising out of any of the provisions of the Constitution relating to any such covenant. Article 366 (22) provides that the expression "Ruler" in relation to an Indian State means a person by whom the covenant referred to in

Article 299 (1) was entered into and who for the time being is recognised by the President as the Ruler of the State and includes any person who for the time being is recognised by the President as the successor of such Ruler

Now the covenant entered into by the Rulers of Madhya Bharat States was a treaty entered into by the Rulers of independent States by which they gave up their sovereignty over their respective territories and vested in it the new United State of Madhya Bharat. The covenant was an act of State and any violation of its terms cannot form the subject of any action in any municipal Courts. The guarantee given by the Government of India was in the nature of a treaty obligation contracted with the sovereign Rulers of Indian States and cannot be enforced by action in municipal Courts. Its sanction is political and not legal. On the coming into force of the Constitution of India the guarantee for the payment of periodical sums as privy purse is continued by Article 291 of the Constitution but its essential political character is preserved by Article 363 of the Constitution and the obligation under this guarantee cannot be enforced in any municipal Court. Moreover if the President refuses to recognise the person by whom the covenant was entered into as the Ruler of the State he would not be entitled to the amount payable as privy purse under Article 291. Now the periodical payment of money by the Government to a Ruler of a former Indian State as privy purse on political considerations and under political sanctions and not under a right legally enforceable in any municipal Court is strictly a political pension within the meaning of section 60 (1) (g) of the Code of Civil Procedure. The use of the expression privy purse instead of the expression pension is due to historical reasons. The privy purse satisfies all the essential characteristics of a political pension and as such is protected from execution under section 60 (1) (g) Code of Civil Procedure. Moreover an amount of the privy purse receivable from the Government cannot be said to be a debt or other property over which or the proceeds of which he has disposing power within the main part of section 60 (1) Code of Civil Procedure. It follows that the third contention of Mr. Pathak must be accepted and it must be held that the amounts of the privy purse are not liable to attachment or sale in execution of the respondent's decree. The third contention is raised in Civil Appeal No. 568 of 1963 arising out of Appeal No. 33 of 1958. It follows that Civil Appeal No. 568 of 1963 must be allowed. All the contentions raised in Civil Appeal No. 767 of 1963 arising from Appeals Nos. 81 and 82 of 1957 fail and accordingly this appeal must be dismissed.

In the result Civil Appeal No. 568 of 1963 is allowed the order of the High Court in Appeal No. 33 of 1958 is set aside and the order of the District Judge dated 15th March 1958, is restored with costs in this Court only. Civil Appeal No. 767 of 1963 is dismissed with costs.

K.S.

C.A. No. 568 of 1963 allowed and  
C.A. No. 767 of 1963 dismissed

## THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT — P. B. GAJENDRAGADKAR *Chief Justice*, M. Hidayatullah, RAJGUPTA, BAR DAHAL AND V. RAMASWAMI, JJ.

Tek Bahadur Bhujil

*Appellant\**

Debi Singh Bhujil and others

*Respondents*

*Family settlement—Requests for validity—Registration when essential—Registration Act (XVI of 1908) section 17—Applicability*

Family arrangement as such can be arrived at orally. Its terms may be recorded in writing as a memorandum of what had been agreed upon between the parties. The memorandum need not be prepared for the purpose of being used as a document on which future title of the parties be founded. It is usually prepared as a record of what had been agreed upon so that there be no hazy notions about

at in future. It is only when the parties reduce the family arrangement in writing with the purpose of using that writing as proof of what they had arranged and, where the arrangement is brought about by the document as such, that the document would require registration as it is then that it would be a document of title declaring for future what rights in what properties the parties possess.

A document which merely records the statements which three brothers made, each referring to others as brothers and referring to the properties as joint property, would serve the purpose of proof or evidence of what had been decided between the brothers. It was not the basis of their rights in any form over the property which each brother had agreed to enjoy to the exclusion of the others. Such a document will not require compulsory registration under section 17 of the Registration Act.

It is not necessary that some title must exist as a fact in the persons entering into a family arrangement. It is not so much an actually existing right as a claim to such a right that matters. By family arrangement no title passes from one in whom it resides to the person receiving it and as no title passes no conveyance is necessary.

Appeal from the Judgment and Order dated 7th August, 1958, of the Assam High Court, Gauhati, in Civil Revision No. 29 (H) of 1957.

*Frank Anthony and D. N. Mukherjee*, Advocates, for Appellant.

*N. C. Chatterjee*, Senior Advocate (*A. K. Nig*, Advocate, with him), for Respondent No. 1.

The Judgment of the Court was delivered by

*Raghubar Dayal, J.*:—This appeal, on certificate issued by the Assam High Court, is by Tek Bahadur Bhujil, brother of Dhanbir Bhujil, respondent No. 2, and uterine brother of Debi Singh Bhujil respondent No. 1. Their mother was Beli Bhujilini, respondent No. 3 since deceased.

Respondent No. 1 instituted a suit on 3rd September, 1946, against the other three aforesaid persons in the Court of the Assistant Political Officer, Khasi States, Shillong, for partition of his half-share in the property mentioned in Schedule A to the plaint, as well as his half-share of the business known as Gurkha Dairy at Mawprem, for separate possession of his such half-share by metes and bounds and for his half-share in the income of profits of the business since 1st January, 1943, to the date of the decree. He alleged in the plaint that he, Tek Bahadur and Dhanbir Bhujil were brothers and belonged to the same joint family centering round their common mother, respondent No. 3, who had come from Nepal about 26 years earlier. It was further alleged that the property in suit and the dairy business were acquired by the family in the name of Tek Bahadur, the eldest brother. Two other businesses were subsequently started. They were the Indian Sweetmeat House and the Dilkhosh Cabin at Police Bazaar, Shillong. These businesses were in the name of Dhanbir Bhujil. It was stated that on 31st December, 1942, the brothers decided with the consent of the mother to enjoy the properties and the businesses in a certain specified manner. The plaintiff and Tek Bahadur were to enjoy half and half the landed property and the dairy business, while Dhanbir was to enjoy the other two businesses. The mother was to enjoy the house property in Shillong Cantonment which had been purchased in her name. It may be mentioned that Dhanbir Bhujil and Beli Bhujilini were *pro forma* defendants and the real relief was claimed against Tek Bahadur, appellant.

The appellant contested the suit on various grounds including the one that all the properties were self-acquired properties of his and that nobody else had any right, title or claim in them. The allegations in the plaint were not admitted and it was specifically stated :

"..... the mother was never or is the head of the family as alleged nor were the properties acquired by the family in the name of the defendant No. 1 as alleged in para. 2 of the plaint."

Of the issues framed, two issues were :

"(1) Whether the properties in suit are joint properties of the plaintiff and defendant 1, to the suit, or the self-acquired property of defendant 1 alone ?

(2) Whether there was any division of the properties with separate possession and enjoyment as alleged ?"

The trial Court decreed the suit against defendant No. 1 holding that the properties in suit were joint properties of the plaintiff and defendant No. 1 and that there had

been a division of the family properties with separate possession and enjoyment by the parties as alleged by the plaintiff

Tek Bahadur, appellant, preferred an appeal to the Deputy Commissioner of United Khasi Jaintia Hills at Shillong. The appeal was dismissed. Tek Bahadur then went up in revision to the High Court of Judicature in Assam, under rule 35 of the rules for the administration of justice and police of the Khasi and Jaintia Hills, as adopted and modified by the Assam Autonomous Districts (Administration of Justice) Regulation, 1952, as applied to the Administered Areas of Shillong. The High Court rejected the petition stating that it had no force.

In support of the alleged division of properties in 1942, the plaintiff respondent relied on the agreement, Exhibit 3, which incorporates the statements of the three brothers and concludes with the expression

"We the three brothers having agreed over the above statement and having made our own statements in the presence of the Panch called by us and signed and kept a copy of each of the document as proof of it. The witnesses in this matter as scheduled are true."

The two questions urged in this appeal on behalf of the appellant are (i) that the agreement Exhibit 3 does not amount to a family arrangement, (ii) that if it does amount to a family arrangement it required registration.

The contention of the appellant about the agreement, Exhibit 3, being not a record of a family arrangement is based on several grounds. Debi Singh, respondent 1, was a uterine brother of the appellant and respondent 2 and therefore could not be a member of their family. There could not be a family arrangement between members of the family and a non member. The landed property, according to the evidence, was purchased from the money of their mother. There was therefore no dispute about the title to this property. Similarly, there was no dispute that the two businesses belonged to respondent No. 2. It is urged that it is essential for the validity of a family arrangement that the parties to it amicably arranged some existing dispute. When there was no dispute there could be no family arrangement. Another attack on the validity of the family arrangement is that the mother was not party to it. It is urged that all the members of the family should join in a family arrangement.

The first contention that respondent No. 1 was not a member of the family was not raised in the Courts below. There was no such plea in the written statement filed by the appellant, and consequently, there was no such issue. The appellant, his brother and mother migrated to this country from Nepal. We do not know whether Hindu law as recognized in this country, obtains in Nepal. It appears that some differences do exist. The plaintiff alleged in the plaint that he, along with, the appellant and respondent No. 2 were brothers and belonged to the same joint family centering round their common mother. There was no specific denial that the brothers did not form a joint family. What was specifically denied was that the mother was the head of the family as alleged or that the properties were acquired by the family in the name of the defendant. The plaintiff, in cross-examination, stated

"It is not a fact that according to Hindu law and according to Nepali Hindu customs, in the absence of the father, mother cannot be the head of the family when there are sons. It is not a fact that my mother was not the head of the family of Dhanbur and Tek Bahadur."

In view of the absence of any such specific pleas, issues and evidence, we are not prepared to accept the contentions for the appellant that respondent No. 1 could not have been a member of the family consisting of the appellant, his brother and mother merely on the ground that he was the appellant's uterine brother.

It is not an admitted case for the parties that the landed property in Mawprem had been acquired from the money of the mother of the appellant and respondents Nos. 1 and 2. The appellant claimed the properties, to be his self acquired property. It is obvious therefore that he must have made such a claim in 1942 when the family arrangement is alleged to have taken place. Respondent No. 1 claimed a share in this property. Possibly, respondent No. 2 also claimed a share, though he possibly also claimed individual rights in the two businesses. There did, therefore, exist disputes about the properties with respect to which the brothers came to certain agreement.

There is nothing in the agreement, Exhibit 3, with respect to the property the mother was to keep with herself. It is however alleged in the plaint and deposed to by respondent No. 1 that the agreement was arrived at with the consent of the mother and that she alone was to own and enjoy the House property in Shillong Cantonment bearing No. 5 Jalupara Bazaar. The mother was therefore a party to the family arrangement. The fact that her statement was not recorded in the agreement, Exhibit 3, does not invalidate the family arrangement which can be arrived at orally. We are therefore of opinion that the Courts below rightly held that there had been a family arrangement between the appellant and respondents Nos. 1 and 2 on 31st December, 1942, and that the agreement Exhibit 3 is a record of that family arrangement.

The next contention for the appellant is that the agreement Exhibit 3 required registration and is of no effect as it was not registered under the Indian Registration Act. The trial Court and the first appellate Court held that the Registration Act was not in force in the area where the agreement was executed at the time of its execution in 1942. The High Court, on the basis of fresh evidence, was of opinion that the matter required further elucidation and that it was not necessary to remand the case for a finding on the point as in its opinion this agreement did not require registration even if the Registration Act was in force in that area at the time of its execution. We need not say therefore anything further about the applicability of the Registration Act in that area, but we have, however, still to consider the contention for the appellant that the agreement Exhibit 3 did require registration. If we agree with him on this point, it would be necessary for the final disposal of the case that a clear-cut finding on the question of the applicability of the Registration Act in that area be recorded by the trial Court or the first appellate Court. We, however, do not agree with the contention of the appellant that the agreement Exhibit 3, required registration.

Family arrangement as such can be arrived at orally. Its terms may be recorded in writing as a memorandum of what had been agreed upon between the parties. The memorandum need not be prepared for the purpose of being used as a document on which future title of the parties be founded. It is usually prepared as a record of what had been agreed upon so that there be no hazy notions about it in future. It is only when the parties reduce the family arrangement in writing with the purpose of using that writing as proof of what they had arranged and, where the arrangement is brought about by the document as such, that the document would require registration as it is then that it would be a document of title declaring for future what rights in what properties the parties possess. The document Exhibit 3 does not appear to be of such a nature. It merely records the statements which the three brothers made, each referring to others as brothers and referring to the properties as joint property. In fact the appellant, in his statement, referred to respondents 1 and 2 as two brother co-partners; and the last paragraph said:

"We, the three brothers, having agreed over the above statement and having made our own statements in the presence of the Panch called by us, and signed and kept a copy of each of this document as proof of it."

The document would serve the purpose of proof or evidence of what had been decided between the brothers. It was not the basis of their rights in any form over the property which each brother had agreed to enjoy to the exclusion of the others. In substance it records what had already been decided by the parties. We may mention that the appellant and respondent No. 1, even under this arrangement, were to enjoy the property in suit jointly and it is this agreement of theirs at the time which has later given rise to the present litigation between the two. The document, to our mind, is nothing but a memorandum of what had taken place and, therefore, is not a document which would require compulsory registration under section 17 of the Registration Act.

Learned Counsel for the appellant laid great stress on what this Court said in *Sahu Madho Das v. Pandit Mukand Ram*<sup>1</sup>. Reliance is placed on the following in

1. (1955) S.G.J. 417 : (1955) 2 S.C.R. 22, 42-43 : (1955) 2 M.L.J. (S.G.) 1.

support of the contention that the brothers having no right in the property purchased by the mother's money, could not have legally entered into a family arrangement. The observations are

It is well settled that a compromise or family arrangement is based on the assumption that there is antecedent title of some sort in the parties and the agreement acknowledges and defines what that title is each party relinquishing all claims to property other than that falling to his share and recognizing the right of the others as they had previously asserted it to the portions allotted to them respectively. That explains why no conveyance is required in these cases to pass the title from the one in whom it resides to the person receiving it under the family arrangement. It is assumed that the title claimed by the person receiving the property under the arrangement had always resided in him or her so far as the property falling to his or her share is concerned and therefore no conveyance is necessary.

These observations do not mean that some title must exist as a fact in the persons entering into a family arrangement. They simply mean that it is to be assumed that the parties to the arrangement had an antecedent title of some sort and that the agreement clinches and defines what that title is. Similar assumption can be made in the present case even on the basis that the property was purchased with the moneys of the mother. How they got some antecedent title in the property is not for us to determine. The plaintiff (respondent No. 1) alleged that the property belonged to the family. The appellant did not allege that it could not have belonged to the family as it was purchased with the moneys of the mother but claimed that it was his self-acquired property. In the circumstances, it can be assumed that the parties recognized the existence of such antecedent title in the parties to the property as was recognized by them under the family arrangement. It is not so much an actually existing right as a claim to such a right that matters.

The observations further indicate that by family arrangement no title passes from one in whom it resides to the person receiving it and as no title passes no conveyance is necessary.

In support of the contention that the agreement Exhibit 3 requires registration, reliance is placed on what was said further in *Madho Das's Case*<sup>1</sup>, which reads

But, in our opinion, the principle can be carried further. We have no hesitation in taking the next step (fraud apart) and upholding an arrangement under which one set of members abandons all claim to all title and interest in all the properties in dispute and acknowledges that the sole and absolute title to all the properties resides in only one of their number (provided he or she had claimed the whole and made such an assertion of title) and are content to take such properties as are assigned to their share as gifts pure and simple from him or her, or as a conveyance for consideration when consideration is present.

The legal position in such a case would be this. The arrangement or compromise would set out and define that the title claimed by A to all the properties in dispute was his absolute title as claimed and asserted by him and that it had always resided in him. Next it would effect a transfer by A to B and D (the members so the arrangement) of properties XT and Z and thereafter B and D would hold their respective titles under the title derived from A. But in that event, the formalities of law about the passing of title by transfer would have to be observed and now either registration or twelve years adverse possession would be necessary.

This Court extended the principle behind the family arrangement to other cases which were not covered by the earlier observations. It is urged, on the basis of these further observations, that registration is necessary for a document recording a family arrangement regarding properties to which the parties had no prior title. These observations apply to a case where one of the parties claimed the entire property and such claim was admitted by the others and the others obtained property from that recognized owner by way of gift or by way of conveyance. In the context of the document stating these facts this Court held the real position to be that the sons obtaining the property from the sole owner derived title to the property from the recognized sole owner and such a document would have to satisfy the various formalities of law about the passing of title by transfer. The facts of the present case are different. The agreement, Exhibit 3, does not recognise that any of the brothers had the sole and absolute title to any of the properties dealt with by them. On the other hand the recitals in the document indicate that the three brothers considered the property to be joint property of all of them. The fact that in the present proceedings the evidence shows that the landed property at Mawprem was

1 (1955) S.C.J. 417 (1955) 2 M.L.J. (S.C.) 1 (1955) 2 S.C.R. 22, 42-43.

purchased from the moneys of the mother does not affect the nature of the arrangement arrived at between the three brothers.

We are therefore of opinion that this case does not help in any way the appellant his contentions.

The result is that the appeal fails and is dismissed with costs.

K.S.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, RAGHUBAR DAYAL AND V. RAMASWAMI, JJ.

Lala Shri Bhagwan and another

*Appellants\**

v.

Shri Ram Chand and another

*Respondents.*

*Uttar Pradesh (Temporary) Control of Rent and Eviction Act (III of 1947), section 7-F—Revisional jurisdiction of State Government—If quasi-judicial—Order made without hearing opposite parties—If bad as opposed to principles of natural justice.*

*Tribunals dealing with rights of citizens—It bound to adopt judicial approach.*

*Practice—Single judge considering earlier decision require reconsideration—Proper procedure.*

The extent of the area where the principles of natural justice have to be followed and judicial approach has to be adopted, must depend primarily on the nature of the jurisdiction and the power conferred on any authority or body by statutory provisions to deal with questions affecting the rights of citizens. The jurisdiction conferred on the Magistrate under section 3 (2) of the U. P. (Temporary) Control of Rent and Eviction Act is of such a character that principles of natural justice cannot be excluded from the proceedings before him. The Commissioner exercises his revisional power under section 3 (3) and must act according to the principles of natural justice. Both the Magistrate acting under section 3 (2) and the Commissioner acting under section 3 (3) are dealing with the question of the rights of the landlord and the tenant and are required to adopt a judicial approach. The revisional proceedings which go before the State Government under section 7-F must partake of the same character. It is true that the State Government is authorised to call for the record *suo motu*, but that cannot alter the fact that the State Government would not be in a position to decide the matter entrusted to its jurisdiction under section 7-F unless it gives an opportunity to both the parties to place their respective points of view before it. It is the ends of justice which determine the nature of the order which the State Government would pass under section 7-F, and in securing the ends of justice, the State Government cannot but apply principles of natural justice and offer a reasonable opportunity to both the parties while it exercises jurisdiction under section 7-F.

*Murlidhar v. State of Uttar Pradesh, A.I.R. 1964 All. 148, overruled.*

Considerations of judicial propriety and decorum require that if a single judge hearing a matter is inclined to take the view that the earlier decisions of the High Court, whether of a Division Bench or of a single judge, need to be reconsidered, he should not embark upon that enquiry sitting as a single judge, but should refer the matter to a Division Bench, or in a proper case, place the relevant papers before the Chief Justice to enable him to constitute a larger Bench to examine the question.

Appeal by Special Leave from the Judgment and Decree dated 9th May, 1963, of the Allahabad High Court in Second Appeal No. 2272 of 1959.

A. V. Viswanatha Sastri, Senior Advocate, (B. R. L. Jangar, S. K. Mehta and K. L. Mehta, Advocates, with him), for Appellants.

C. B. Agarwala, Senior Advocate, (S. S. Kahnduja and Ganpat Rai, Advocates with him), for Respondents.

The Judgment of the Court was delivered by

Gajendragadkar, C.J.:—The short question of law which arises in this appeal by Special Leave is whether the revisional order passed by the State Government of



Uttar Pradesh under section 7 F of the Uttar Pradesh (Temporary) Control of Rent and Eviction Act 1947 (hereinafter called the Act) is rendered invalid by reason of the fact that before passing the said order, the State Government did not hear the two respondents Ram Chand and Kailash Chand who were affected by it. This question arises in this way. The respondents are the present tenants of the premises bearing municipal No 863 situated at Jumna Kinara Road Agra commonly known as Putaria Mahal. Their predecessors were let into possession as tenants by the appellants Lala Shri Bhagwan and Shrimati Gopal Devi on an agreement that they would pay a monthly rent of Rs 58 4-0 and that the tenancy would commence from the *Sudi* 1 of each Hindi month and end on *Badi* 15 of the next month. The two appellants applied to the Rent Controller and Eviction Officer (hereafter called the Officer) under section 3 of the Act for permission to file a suit in ejectment against the predecessors in interest of the respondents. The Officer granted permission by his order passed on 1st September 1951. The respondents then moved the Additional District Magistrate who had been authorised by the District Magistrate to hear appeals against the decision of the Officer. The appellate authority declined to confirm the permission granted to the appellants and remanded the case to the Officer for a fresh hearing. On re-hearing the matter the Officer changed his view and rejected the appellants' application for permission on 9th August 1952. The appellants then moved the appellate authority again and prayed that the original order granting permission to them to sue the respondents should be restored. On 9th December 1952 the appellate authority ordered that permission should be granted to the appellants for suing the respondents in ejectment. The respondents then moved the Commissioner of Agra in revision. On 4th February, 1953 the revisional authority allowed the revisional application and set aside the appellate order granting permission to the appellants. That took the appellants to the State Government under section 7 F of the Act. On 7th May 1953 the State Government directed the Commissioner to revise his order on the ground that it thought that the need of the appellants was genuine. Acting in pursuance of this direction the Commissioner passed an order on 28th July, 1953, by which he cancelled his previous order and confirmed the order passed by the appellate authority granting permission to the appellants to sue the respondents in ejectment. This order was clearly the result of the direction issued by the State Government under section 7 F of the Act. After this order was passed the appellants sued the respondents in ejectment. The Court of the Civil Judge, Agra

The claim made by the appellants for ejectment of the respondents was resisted by them on several grounds and on the contentions raised by the respondents the trial Court framed six issues. One of the issues was whether the permission granted to the appellant to sue the respondents was valid. It is with this issue that we are concerned in the present appeal. The trial Judge found in favour of the appellants on this issue and recorded his conclusion in their favour even on the other issues which had been framed by him. In the result the trial Court passed a decree in favour of the appellants on 31st August, 1957. The respondents challenged this decree by preferring an appeal in the Court of the First Additional Civil Judge Agra. In their appeal they disputed the correctness of the findings recorded by the trial Court on all the issues including the issue about the validity of the sanction obtained by the appellants before filing the present suit. The appeal Court confirmed all the findings recorded by the trial Judge with the result that the respondents' appeal was dismissed on the 30th May, 1959.

The respondents then went to the Allahabad High Court by way of Second Appeal. The learned single Judge of the said High Court who heard the said appeal was called upon to consider the question as to whether the permission granted to the appellants was valid. That in fact, was the only issue which was raised before him. The other issues which had been found in favour of the appellants were not raised before the learned Judge. On the issue as to the validity of the sanction obtained by the appellants the learned Judge came to the conclusion that the said

sanction was invalid inasmuch as the State Government in exercising its authority under section 7-F of the Act, had not given an opportunity to the respondents to be heard. He took the view that in exercising its authority under section 7-F the State Government was required to decide the matter in revision in a quasi-judicial manner and it was absolutely essential that the principles of natural justice should have been followed by the State Government before reaching its decision and an opportunity should have been given by it to the respondents to place their case before it.

It appears that this question had been considered by Division Benches of the Allahabad High Court in the past and the consensus of judicial opinion appears to have been in favour of the view that the revisional order which the State Government is authorised to pass under section 7-F, is not a quasi-judicial order but is a purely administrative order, and so, it is not necessary that the State Government should hear the parties before exercising its jurisdiction under the said section. The learned single Judge was persuaded by the respondents to consider whether the said decisions were right and he came to the conclusion that the view taken in the said decisions was not right. The judgment delivered by the learned single Judge shows that he had reached this conclusion on re-examining the question in the light of some decisions of this Court to which his attention was invited. After he had reached this conclusion and had dictated a substantial part of his judgment, his attention was drawn to a decision of this Court in *Laxman Purshottam Pimpulkar v. State of Bombay and others*<sup>1</sup>, which was then not reported. The learned Judge considered the blue print of the judgment to which his attention was invited and thought that the said judgment confirmed the view he had already taken about the nature of the proceedings and the character of the jurisdiction contemplated by section 7-F. Having held that the State Government was bound to give an opportunity to the respondents to place their version before it, before it exercised its authority under section 7-F, the learned Judge naturally came to the conclusion that the impugned order passed by the State Government under section 7-F was invalid, and that inevitably meant that under section 3 of the Act, the suit was incompetent. In the result, the Second Appeal preferred by the respondents was allowed and the appellants' suit ordered to be dismissed. In the circumstances of the case, the learned Judge directed that the parties should bear their own costs throughout. It is against this decision that the appellants have come to this Court by Special Leave; and so, the only point which falls for our decision is whether the revisional order passed by the State Government under section 7-F, without giving an opportunity to the respondents to place their case before it, is rendered invalid.

When a legislative enactment confers jurisdiction and power on any authority or body to deal with the rights of citizens, it often becomes necessary to enquire whether the said authority or body is required to act judicially or quasi-judicially in deciding question entrusted to it by the statute. It sometimes also becomes necessary to consider whether such an authority or body is a tribunal or not. It is well-known that even administrative bodies or authorities which are authorised to deal with matters within their jurisdiction in an administrative manner, are required to reach their decisions fairly and objectively; but in reaching their decisions, they would be justified in taking into account considerations of policy. Even so, administrative bodies may, in acting fairly and objectively, follow the principles of natural justice; but that does not make the administrative bodies tribunals and does not impose on them an obligation to follow the principles of natural justice. On the other hand, authorities or bodies which are given jurisdiction by statutory provisions to deal with the rights of citizens, may be required by the relevant statute to act judicially in dealing with matters entrusted to them. An obligation to act judicially may, in some cases, be inferred from the scheme of the relevant statute and its material provisions. In such a case, it is easy to hold that the authority or body must act in accordance with the principles of natural justice before exercising its jurisdiction and

its powers, but it is not necessary that the obligation to follow the principles of natural justice must be expressly imposed on such an authority or body. If it appears that the authority or body has been given power to determine questions affecting the rights of citizens, the very nature of the power would inevitably impose the limitation that the power should be exercised in conformity with the principles of natural justice. Whether or not such an authority or body is a tribunal, would depend upon the nature of the power conferred on the authority or body, the nature of the rights of citizens, the decision of which falls within the jurisdiction of the said authority or body, and other relevant circumstances. This question has been considered by this Court on several occasions. In *The Associated Cement Companies Ltd., Bhopendra Cement Works, Surajpur v P N Sharma and another*<sup>1</sup> both aspects of this matter have been elaborately examined and it has been held, adopting the view expressed by the House of Lords in *Ridge v Baldwin and others*<sup>2</sup>, that the extent of the area where the principles of natural justice have to be followed and judicial approach has to be adopted must depend primarily on the nature of the jurisdiction and the power conferred on any authority or body by statutory provisions to deal with the questions affecting the rights of citizens. In other words in that decision this Court has held that the test prescribed by Lord Reid in his judgment in the case of *Ridge*<sup>3</sup> affords valuable assistance in dealing with the vexed question with which we are concerned in the present appeal.

Let us therefore, examine the scheme of the Act and the nature of the power and jurisdiction conferred on the State Government by section 7 F. The Act was passed in 1947 and its main object obviously was in the words of the Preamble, to continue during a limited period powers to control the letting and the rent of residential and non residential accommodation and to prevent the eviction of tenants therefrom. The Preamble further provides that whereas due to shortage of accommodation in Uttar Pradesh it is expedient to provide for the continuance during a limited period of powers to control the letting and the rent of such accommodation and to prevent the eviction of tenants therefrom the Act was enacted. Indeed, it is a matter of common knowledge that similar Acts have been passed in all the States in India.

Section 3 of the Act provides that 'subject to any order passed under sub section (3) no suit shall, without the permission of the District Magistrate, be filed in any civil Court against a tenant for his eviction from any accommodation, except on one or more of the following grounds'. Then follow seven clauses (a) to (g) which set out the grounds on which a landlord can seek to evict his tenant even without the permission of the District Magistrate. The scheme of section 3 therefore, is that in order to protect the tenants from eviction the Legislature has provided that the landlords could evict their tenants only if there was proof of the existence of one or the other of the seven grounds specified by clauses (a) to (g) in section 3 (1). Having made this general provision, section 3 (1) makes an exception and enables the landlord to seek to evict his tenant even though his case may not fall under any of the seven clauses of section 3 (1), provided he has obtained the permission of the District Magistrate. In other words, if the District Magistrate grants permission to the landlord, he can sue to evict the tenant under the general provisions of the Transfer of Property Act, as for instance, section 106. This clearly means that the District Magistrate is empowered to grant exemption to the landlord from complying with the requirements of clauses (a) to (g) of section 3 (1) and take the case of the tenancy in question outside the provisions of the said clauses. That is the nature and effect of the power conferred on the District Magistrate to grant permission to the landlord to sue his tenant in eviction.

Section 3, as it was originally enacted provided that no suit shall, without the permission of the District Magistrate, be filed in any civil Court against a tenant for his eviction from any accommodation except on one or more of the grounds specified by clauses (a) to (f). Clause (g) has been subsequently added.

In 1952, clauses (2), (3) and (4) were added to section 3 by the Amending Act XXIV of 1952. It is as a result of these amendments that section 3 (1) now provides that subject to any order passed under sub-section (3), the permission granted by the District Magistrate would enable the landlord to sue his tenant in ejectment. It is now necessary to read sub-sections (2), (3) and (4), which are as follows :—

“(2) Where any application has been made to the District Magistrate for permission to sue a tenant for eviction from any accommodation and the District Magistrate grants or refuses to grant the permission, the party aggrieved by his order may, within 30 days from the date on which the order is communicated to him, apply to the Commissioner to revise the order.

(3) The Commissioner shall hear the application made under sub-section (2), as far as may be, within six weeks from the date of making it, and he may, if he is not satisfied as to the correctness of the order passed by the District Magistrate or as to the regularity of proceedings held before him, alter or reverse his order, or make such other order as may be just and proper.

(4) The order of the Commissioner under sub-section (3) shall, subject to any order passed by the State Government under section 7-F, be final.”

The scheme of these three sub-sections is that the District Magistrate should first consider whether the landlord should be allowed to sue without complying with clauses (a) to (g) of section 3 (1). When he decides the question one way or the other, the party aggrieved by the decision has been given a right to apply to the Commissioner to revise the said order within the limitation prescribed by sub-section (2). That takes the proceedings before the Commissioner, and he exercises his revisional jurisdiction and reaches his own decision in the matter. Sub-section (4) provides that the revisional order passed by the Commissioner shall, subject to the order passed by the State Government under section 7-F, be final. That takes us to section 7-F. Section 7-F reads thus :—

“The State Government may call for the record of any case granting or refusing to grant permission for the filing of a suit for eviction referred to in section 3 or requiring any accommodation to be let or not to be let to any person under section 7 or directing a person to vacate any accommodation under section 7-A and may make such order as appears to it necessary for the ends of justice.”

As we have already indicated, the question we have to decide in the present appeal is : what is the nature of the proceedings taken before the State Government under section 7-F and what is the character of the jurisdiction and power conferred on the State Government by it ; are the proceedings purely administrative, and can the State Government decide the question and exercise its jurisdiction without complying with the principles of natural justice ?

In dealing with this question, we have first to examine the nature of the power conferred on the District Magistrate himself. There is no doubt that what the District Magistrate is authorised to do is to permit the landlord to claim eviction of his tenant, though he may not comply with section 3 (1), clauses (a) to (g), and that clearly means that the order which the District Magistrate may pass while granting sanction to the landlord has the effect of taking away from the tenants the statutory protection given to them by the scheme of section 3 (1). A landlord can normally evict his tenant by complying with the relevant provisions of the Transfer of Property Act. Section 3 (1) imposes a statutory limitation on the said power by requiring the proof of one or the other of the seven grounds stated in clauses (a) to (g) of section 3 (1), before he can seek to evict his tenant. That limitation is removed by the sanction which the District Magistrate may grant ; and so, it is plain that the order which the District Magistrate passes under section 3 (2), affects the statutory rights of the tenants. That is one aspect of the matter which cannot be ignored.

The second aspect of the matter is that the party who may feel aggrieved by the order passed by the District Magistrate, is given the right to move the Commissioner in revision within the prescribed period of limitation, and this provision necessarily implies that the District Magistrate should indicate his reasons why he makes a particular order under section 3 (2). Unless the District Magistrate indicates, though briefly, the reasons in support of his final order, the Commissioner would not be able to exercise his jurisdiction under section 3 (3). How could the Commissioner consider the question as to whether the order passed by the District Magis-

trate is correct or is legal or is proper unless he knows the reasons on which the said order is based? Thus the provision for a revisional application to the Commissioner also indicates that the District Magistrate has to weigh the pros and cons of the matter and come to a certain conclusion before he makes the order. The rule naturally imports the requirements that the parties should be allowed to put their versions before him. The District Magistrate cannot reasonably weigh the pros and cons unless both the landlord and the tenant are given an opportunity to place their versions before him. Therefore we are satisfied that the jurisdiction conferred on the District Magistrate to deal with the rights of the parties is of such character that principles of natural justice cannot be excluded from the proceedings before him.

This conclusion is very much strengthened when we consider the provisions of section 3 (3). This clause specifically requires the Commissioner to hear the application made under sub-section (2) within the specified period. This requirement positively suggests that the proceedings before the Commissioner are quasi-judicial. This clause further provides that the Commissioner has to be satisfied as to the correctness, legality or propriety of the order under revision. He can also examine the question as to the regularity of the proceedings held before the District Magistrate. In our opinion it is impossible to escape the conclusion that these provisions unambiguously suggest that the proceedings before the District Magistrate as well as before the Commissioner are quasi-judicial in character. Further, the revisional power has to be exercised and a revisional order has to be passed by the Commissioner to serve the purpose of justice because the clause provides that the Commissioner may make such other order as may be just and proper. Thus we are satisfied that when the District Magistrate exercises his authority under section 3 (2) and the Commissioner exercises his revisional power under section 3 (3), they must act according to the principles of natural justice. They are dealing with the question of the rights of the landlord and the tenant and they are required to adopt a judicial approach.

If that be the true position in regard to the proceedings contemplated by sub-section 3 (2) and sub-section 3 (3) it is not difficult to hold that the revision proceedings which go before the State Government under section 7 F must partake of the same character. It is true that the State Government is authorised to call for the record *suo motu* but that cannot alter the fact that the State Government would not be in a position to decide the matter entrusted to its jurisdiction under section 7 F, unless it gives an opportunity to both the parties to place their respective points of view before it. It is the ends of justice which determine the nature of the order which the State Government would pass under section 7 F, and it seems to us plain that in securing the ends of justice the State Government cannot but apply principles of natural justice and offer a reasonable opportunity to both the parties while it exercises its jurisdiction under section 7 F.

We have already referred to the general policy of the Act. In that connection we may mention two other sections of the Act. Section 14 provides that no decree for the eviction of a tenant from any accommodation passed before the date of commencement of this Act, shall in so far as it relates to the eviction of such tenant, be executed against him so long as this Act remains in force except on any of the grounds mentioned in section 3. This section emphatically brings out the main object of the Act which is to save the tenants from eviction. That is why it prescribes a bar against the execution of the decrees which may have been passed for the eviction of tenants before the Act came into force unless the landlords are able to show one or the other grounds mentioned in section 3.

A similar provision is made by section 15 in regard to pending suits. It lays down that in all suits for eviction of tenants from any accommodation pending on the date of commencement of this Act, no decree for eviction shall be passed except on one or more of the grounds mentioned in section 3. These provisions also emphasise the importance attached by the Act to the protection of the tenants from eviction. The right conferred on the tenants not to be evicted except on the specified grounds

enumerated by clauses (a) to (g) of section 3 (1), is a statutory right of great significance, and it is this statutory right of which the tenants would be deprived when the landlord obtains the sanction of the District Magistrate. That is why we think the Act must be taken to require that in exercising their respective powers, under section 3 (2) and section 3 (3), the appropriate authorities have to consider the matter in a quasi-judicial manner, and are expected to follow the principles of natural justice before reaching their conclusions.

We have already indicated that the Allahabad High Court had consistently taken the contrary view and held that the functions discharged by the appropriate authorities under section 3 (2) and section 3 (3) are administrative and an obligation to follow the principles of natural justice cannot be imposed on the said authorities vide *Narottam Saran v. State of U.P.*<sup>1</sup>. Indeed, after the learned single Judge had held in the present proceedings that the view taken by the earlier decisions of the Allahabad High Court was erroneous, a Division Bench of the said High Court considered the same question once again and re-affirmed its earlier view vide *Murlidhar v. State of U.P.*<sup>2</sup>. We have carefully considered the reasons given by the learned Judges when they re-affirmed the earlier view taken by the High Court of Allahabad on this point. With respect, we are unable to agree with the decision in *Murlidhar's case*<sup>2</sup>.

In this connection, we may refer to the decision of this Court in *Laxman Purshottam Pimpulkar's case*<sup>3</sup> on which the learned single Judge partly relied in support of his conclusion. In that case, this Court was called upon to consider the question whether the revisional jurisdiction conferred on the State Government under section 19 of the Watan Act was purely administrative, and it came to the conclusion that in exercising the said revisional jurisdiction, the State Government is not acting purely as an administrative authority; its decision is judicial or quasi-judicial and so it is essential that the State Government should follow the principles of natural justice before reaching its conclusion under that section. The scheme of the relevant provisions of the Watan Act cannot however be said to be exactly similar to the scheme of the Act with which we are concerned; whereas section 3 of the Act with which we are concerned in the present appeal deals with the statutory rights conferred on the tenants, the relevant sections of the Watan Act dealt with the right of possession of the Watan property itself. That being so, it cannot be said that the decision in *Laxman Purshottam Pimpulkar's case*<sup>3</sup> can be deemed to have over-ruled by necessary implication the view taken by the Allahabad High Court in regard to the nature of the power conferred on the appropriate authorities by sections 3 and 7-F of the Act.

Before we part with this appeal, however, we ought to point out that it would have been appropriate if the learned single Judge had not taken upon himself to consider the question as to whether the earlier decisions of the Division Benches of the High Court needed to be re-considered and revised. It is plain that the said decisions had not been directly or even by necessary implication overruled by any decision of this Court, indeed, the judgment delivered by the learned single Judge shows that he was persuaded to re-examine the matter himself and in fact he had substantially recorded his conclusion that the earlier decisions were erroneous even before his attention was drawn to the decision of this Court in *Laxman Purshottam Pimpulkar's case*<sup>3</sup>. It is hardly necessary to emphasise that considerations of judicial propriety and decorum require that if a learned single Judge hearing a matter is inclined to take the view that the earlier decisions of the High Court, whether of a Division Bench or of a single Judge, need to be re-considered, he should not embark upon that enquiry sitting as a single Judge, but should refer the matter to a Division Bench or, in a proper case, place the relevant papers before the Chief Justice to enable him to constitute a larger Bench to examine the question. That is the proper and traditional way to deal with such matters and it is founded on healthy principles of judicial decorum and propriety. It is to be regretted that the

1. A.I.R. 1954 All. 232.

2. A.I.R. 1964 All. 148.

3. (1964) 1 S.C.R. 200 : (1964) 1 S.C.J. 180.

learned single Judge departed from this traditional way in the present case and chose to examine the question himself

The result is, the appeal fails and is dismissed There will be no order as to costs

K.S

*Appeal dismissed*

# THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT —K SUBBA RAO, J C SHAH AND R S BACHAWAT, JJ

Rangubai Kom Shankar Jagtap

*Appellant\**

v

Sunderabai Bharatar Sakharam Jedhe and others

*Respondents*

*Supreme Court Rules (1950) Order 16 rule 14-A—Scope—Civil Procedure Code (V of 1908) Order 22—Appeal against preliminary decree—Death of respondent—Legal representative impleaded in final decree proceedings—If saves appeal from abatement*

Rule 14-A of Order 16 the Supreme Court Rules 1950 incorporates the rules of abatement in the Code of Civil Procedure Order 22 and also Article 171 in the First Schedule to the Indian Limitation Act in the Supreme Court Rules The result of these provisions is that if an application to bring on record the legal representatives of a respondent is not made within 90 days from the date of death of the said respondent, the appeal abates but an application to set aside that abatement can be made within 60 days from the date of abatement.

No doubt an order bringing the legal representatives on record in one stage of the suit be it in the suit or in an appeal against the interlocutory order or final order made in the suit enures for all subsequent stages of the suit But the same legal position cannot be invoked in the reverse or converse situation. A suit is not a continuation of an appeal. An order made in a suit subsequent to the filing of an appeal at an earlier stage will move forward with the subsequent stages of the suit or appeals taken therefrom, but it cannot be projected backwards into the appeal that has already been filed It cannot possibly become an order in the appeal. Therefore the order bringing the legal representatives of a respondent on record in the final decree proceedings cannot enure for the benefit of the appeal filed against the preliminary decree Consequently there was an abatement of the appeal so far as the deceased respondent was concerned

*Dry Loder Singh v Kanhai Ram* L.R. 44 I.A. 218 (228) 33 M.L.J. 486 and *Shankaranarayan Saralaya v Laxmi Hengru* 60 M.L.J. 267 distinguished

[In the instant case there were no sufficient grounds for excusing the delay (of over three years) in filing the application for bringing the legal representatives of that respondent on record]

Applications for substitution and for condonation of delay Appeal by Special Leave from the Judgment and Decree dated 8th April, 1959, of the Bombay High Court in First Appeal No 666 of 1954

S G Patwardhan, Senior Advocate, (A G Ratnaparkhi, Advocate, with him), for Applicant

*Against Lal*, Advocate, for Respondents

The Order of the Court was delivered by

*Sabba Rao, J*—These are two applications one for the substitution of the legal representatives of respondent No 7 in Civil Appeal No 430 of 1963 on the file of this Court and the other for the condonation of delay in filing the first application

The first question is whether there is sufficient ground for excusing the delay in filing the application for bringing the legal representatives of the 7th respondent on record The facts are as follows Sakharam Maruti Jedhe and others filed Special Civil Suit No 10 of 1954 in the Court of the Civil Judge, Senior Division Poona, against Rangubai Kom Shankar Jagtap for possession of the plaint-schedule property and for mesne profits and obtained a decree therein Against the said decree the defendant preferred an appeal to the High Court of Bombay The High Court by its judgment dated 8th April, 1959, dismissed the appeal The defendant filed an application for Special Leave to prefer an appeal to this Court and the same was

\* C.M.F. Nos. 2401 and 2402 of 1964 in the matter of C.A. No 430 of 1963

granted on 16th June, 1959. The appeal was admitted on 27th July, 1961. Between these two dates, on 12th November, 1959, the 7th respondent, Keshavarao Marutirao Jedhe died. Thereafter, on 7th March, 1964, the defendant filed Civil Application No. 1118 of 1964 in the High Court of Bombay for bringing on record the legal representatives of the 7th respondent and for necessary certificate to that effect. On 11th August, 1964, a Division Bench of the High Court granted the certificate. On 19th February, 1964 the defendant filed in this Court Civil Miscellaneous Petition No. 2401 of 1964 for bringing on record the legal representatives of the 7th respondent and on 8th October, 1964, filed Civil Miscellaneous Petition No. 2402 of 1964 for condoning the delay of 4 years and 19 days in filing the aforesaid first petition. In the said petition the petitioner gave two reasons for condoning the delay, namely, (i) the petitioner is a poor widow living in Poona with her daughters and there is no male members in the family of the petitioner to look after the proceedings, and (ii) after the preliminary decrees in the proceedings for the determination of the mesne profits, the plaintiffs brought the heirs and legal representatives of the deceased 7th respondent on record within the time prescribed and as the legal representatives were brought on record at one stage of the suit, no question of abatement would arise in respect of the appeal. The respondents filed a counter-affidavit pointing out that there were no grounds for excusing the inordinate delay, that the appellant had been conducting this long drawn litigation from the year 1946, that she had a son-in-law who was helping her, that the deceased was a prominent man of Poona whose death was published in all the newspapers and that the appellant was living in the same locality and she must have had knowledge of his death soon after it occurred. It was further pleaded that the fact that the legal representatives of the 7th respondent were brought on record in the final decree proceedings could not in law prevent the abatement of the appeal, if they were not brought on record in the appeal in time.

Under Order 16, rule 14, of the Supreme Court Rules, 1950, an application to bring on record the legal representatives of a deceased appellant or respondent shall be made within 90 days of the death of the said appellant or respondent. Under the proviso thereto, in computing the said period the time taken in obtaining a certificate from the High Court shall be excluded. Even if the said time is excluded, there will be a delay of about 3½ years in filing the application to bring the legal representatives of the deceased 7th respondent on record. From the counter-affidavit filed by the respondents it is clear that the 7th respondent was a prominent citizen of Poona and the fact of his death was published in all newspapers; and the petitioner resides very near the place where the 7th respondent was living. She has been conducting this litigation from the year 1946 and was in contact with her Advocates from time to time in connection with the appeal. She has also a son-in-law who is helping her in the litigation. She had also the knowledge of the fact that the legal representatives of the 7th respondent were brought on record in the final decree proceedings. In the circumstances the fact that she is an illiterate woman cannot possibly be a ground for excusing this inordinate delay in bringing the legal representatives of the 7th respondent on record in the appeal. We, therefore, hold that there is no sufficient ground for excusing the delay in bringing the legal representatives of the 7th respondent on record.

The next question raised is an interesting one of law. From the aforesaid narration of facts it will be seen that the legal representatives of the 7th respondent were brought on record within the prescribed time in the final decree proceedings. The question is whether it would enure for the benefit of the appeal; that is to say whether by reason of that fact there is no abatement of the appeal.

The relevant provisions of the Supreme Court Rules, 1950, read thus: We have already given the gist of Order 16, rule 14 of the said Rules. Rule 14-A thereof reads:

"The provisions of Order 22 of the Code relating to abatement and of Article 171 in the First Schedule to the Indian Limitation Act, 1908 (IX of 1908), shall, so far as may be applicable, apply to appeals and proceedings under rule 12 and rule 13 in the High Court and in the Supreme Court."



Rule 14 A by reference incorporates the rules of abatement in the Code of Civil Procedure and also Article 171 in the First Schedule to the Indian Limitation Act in the Supreme Court Rules. Under Order 22 rules 3 and 4 of the Code of Civil Procedure, if the plaintiff or the defendant dies and the right to sue does not survive to the surviving plaintiff or against the surviving defendant, as the case may be, his legal representatives shall be brought on record within the prescribed time, and where within the time limited by law no application is made the suit shall abate so far as the deceased plaintiff is concerned or against the deceased defendant, as the case may be. Under rule 11 thereof 'in the application of this Order to appeals so far as may be, the word 'plaintiff' shall be held to include the appellant, the word 'defendant' a respondent, and the word 'suit' and an appeal'. The result is that for the purpose of abatement a suit and an appeal are treated as different proceedings and the suit or the appeal, as the case may be, abates if the legal representatives of the deceased plaintiff or defendant are not brought on record within the time prescribed. Under Article 171 of the First Schedule to the Limitation Act an application to set aside an order of abatement shall be made within 60 days from the date of abatement. The result of these provisions is that if an application to bring on record the legal representatives of a respondent is not made within 90 days from the date of death of the said respondent, the appeal abates, but an application to set aside that abatement can be made within 60 days from the date of abatement.

But, if by reason of the fact that the legal representatives of the deceased 7th respondent were brought on record in the final decree proceedings, there was no abatement, this Court no doubt will exercise its discretion liberally in condoning the delay in not formally getting the legal representatives of a deceased party recorded in appeal in time.

The main contention, therefore, is that by reason of the fact that they were brought on record in the final decree proceedings, there was no abatement of the appeal.

It is said that the final decree proceedings is a stage in the suit and the appeal is another stage in the suit, and, therefore, the bringing on record of the legal representatives in one stage of the suit will enure for all stages of the suit including the appeal. This conclusion, the argument proceeds, flows from the reasoning of the judgment of the Judicial Committee in *Bry Indar Singh v. Kanish Ram*<sup>1</sup>. The relevant facts of that case were these: Pending a suit an application was made for directing a party to produce certain books and that was ordered by the District Judge. Thereafter an application was made to the Chief Court to revise the order of the District Judge. Pending the revision the plaintiff and the 2nd defendant died. Within the prescribed time their legal representatives were brought on record in the revision. Subsequently that revision was dismissed as withdrawn. The legal representatives of the plaintiff and the 2nd defendant were not brought on record in the suit within the time prescribed. The question was whether the suit had abated. The Judicial Committee held that the suit did not abate and the following reasons were given for that view:

The plaintiff's representatives of the original plaintiff and the defendant's representatives of Joti Lal had been introduced in the Chief Court. No doubt that was only done in the course of an interlocutory application as to the production of books. But the introduction of a plaintiff or a defendant for one stage of a suit is an introduction for all stages and the prayer which seems to have been made as *in personam* control by the plaintiff in his application to the District Judge. Preter under section 300 was superfluous and of no effect. Hence the judgment-debtor was only formally called and the non presence of his representatives would afford no ground for the abatement of the suit.

This judgment is an authority for the position that if the legal representatives of a deceased plaintiff or defendant are brought on record in an appeal or revision from an order made in the suit, that would enure for all subsequent stages of the suit. The same principle was sought to be extended in a Madras decision to a cross appeal.

see *Shankaranaradina Saralaya v. Laxmi Hengsu*<sup>1</sup>. There, two appeals were independently filed against the decree in a suit—one was filed by the plaintiff and the other by the defendant. The plaintiff-appellant died and in the appeal filed by him his legal representatives were brought on record in time, whereas it was not so done in the appeal filed by the defendant-respondent. It was argued that by reason of the fact that the legal representatives of the plaintiff were brought on record in the appeal filed by him there was no abatement in the appeal filed by the defendant. The Court negatived the contention and when the aforesaid decision of the Privy Council was cited, it was distinguished on the following grounds :

“ Their Lordships have held that the introduction of a plaintiff or a defendant for one stage of a suit is an introduction for all stages. When the subject-matter of the interlocutory application was pending in the appellate Court it was deemed to be one stage of the suit and therefore there was no need to put in a fresh application at a further stage of the suit when it came on for trial before the first Court. Can it be said in the present case that what was done in one appeal could enure for the benefit of another appeal unless the latter appeal can be deemed to be a continuation or a further stage of the appeal in which the legal representatives were brought on record ? I am constrained to say that it is difficult to extend the principle of the decision of the Privy Council to the facts of this case. ”

This decision accepts the principle laid down by the Privy Council but distinguishes the case before it on the ground that the interlocutory appeal is not a continuation or a further stage of the appeal in which the legal representatives were brought on record. Many other decisions were cited at the Bar, but they only support the position that in bringing the legal representatives of a deceased party on record in one appeal will not enure for the benefit of a cross-appeal.

Let us now consider the question on principle. A combined reading of Order 22, rules 3, 4 and 11, of the Code of Civil Procedure, shows that the doctrine of abatement applies equally to a suit as well as to an appeal. In the application of the said rules 3 and 4 to an appeal, instead of “ plaintiff ” and “ defendant ”, “ appellant ” and “ respondent ” have to be read in those rules. *Prima facie*, therefore, if a respondent dies and his legal representatives are not brought on record within the prescribed time, the appeal abates as against the respondent under rule 4, read with rule 11 of Order 22 of the Code of Civil Procedure. But there is another principle recognized by the Judicial Committee in the aforesaid decision which softens the rigour of this rule. The said principle is that if the legal representatives are brought on record within the prescribed time at one stage of the suit, it will enure for the benefit of all the subsequent stages of the suit. The application of this principle to different situations will help to answer the problem presented in the present case. (1) *A* filed a suit against *B* for the recovery of possession and mesne profits. After the issues were framed, *B* died. At the stage of an interlocutory application for production of documents, the legal representatives of *B* were brought on record within the time prescribed. The order bringing them on record would enure for the benefit of the entire suit. (2) The suit was decreed and an appeal was filed in the High Court and was pending therein. The defendant died and his legal representatives were brought on record. The suit was subsequently remanded to the trial Court. The order bringing the legal representatives on record in the appeal would enure for the further stages of the suit. (3) An appeal was filed against an interlocutory order made in a suit. Pending the appeal the defendant died and his legal representatives were brought on record. The appeal was dismissed. The appeal being a continuation or a stage of the suit, the order bringing the legal representatives on record would enure for the subsequent stages of the suit. This would be so whether in the appeal the trial Court's order was confirmed, modified or reversed. In the above 3 illustrations one fact is common, namely, the order bringing on record the legal representatives was made at one stage of the suit, be it in the suit or in an appeal against the interlocutory order or final order made in the suit, for an appeal is only a continuation of the suit. Whether the appellate order confirms that of the first Court, modifies or reverses it, it replaces or substitutes the order appealed against. It takes its place in the suit and becomes a part

of it. It is as if the suit was brought to the appellate Court at one stage and the orders made therein were made in the suit itself. Therefore, that order enures for the subsequent stages of the suit.

But the same legal position cannot be invoked in the reverse or converse situation. A suit is not a continuation of an appeal. An order made in a suit subsequent to the filing of an appeal at an earlier stage will move forward with the subsequent stages of the suit or appeals taken therefrom, but it cannot be projected backwards into the appeal that has already been filed. It cannot possibly become an order in the appeal. Therefore the order bringing the legal representatives of the 7th respondent on record in the final decree proceedings cannot enure for the benefit of the appeal filed against the preliminary decree. We, therefore, hold that the appeal abated so far as the 7th respondent was concerned.

In the result, the petitions are dismissed.

K. S.

*Petitions dismissed*

## THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT —K. SUBBA RAO, J. C. SHAH AND R. S. BACHAWAT, JJ

The University of Mysore and others

*Appellants\**

Gopala Gowda and another

*Respondents*

*Mysore University Act (XXIII of 1956) sections 22, 23 and 43—Powers of Academic Council under—If includes power to make a regulation that no candidate who fails four times shall be permitted to continue the Bachelor of Veterinary Science Course*

Clause 3 (c)—(saying that no candidate who fails four times shall be permitted to continue the course)—of the Regulations relating to the grant of a degree for Bachelor of Veterinary Science made by the Academic Council in exercise of the powers conferred by sections 22, 23 and 43 of the Mysore University Act (XXIII of 1956) is valid. Power to prescribe conditions on which a student may be admitted to the examinations, necessarily implies the power to refuse to admit a student in certain contingencies, for the power to admit to an examination implies the power to weed out students who have on the application of a reasonable test proved themselves to be unfit to continue the course or prosecute training in that course. If on account of general inaptitude for being trained in a course or on account of supervening disability to prosecute a course of study a student admitted to that course is found by the Academic Council to be unfit to prosecute his training, it would be within the power of the Academic Council, in exercise of its authority to control and maintain standards and also of its authority to prescribe conditions on which students may be admitted to examinations, to direct that the student shall discontinue training in that course. And failure by a student to qualify for promotion or degree in four examinations is certainly a reasonable test of such inaptitude or supervening disability. If after securing admission to an institution imparting training for professional courses a student may be held entitled to continue indefinitely to attend the institution without adequate application and to continue to offer himself for successive examinations, a lowering of academic standards would inevitably result. Power to maintain standards in the course of studies confers authority not merely to prescribe minimum qualifications for admission to courses of study and minimum attendance at an institution which may qualify the student for admission to the examination, but also authority to refuse to grant a degree or diploma, certificate or other academic distinction to students who fail to satisfy the examiners at the final examination and to direct that a student who is proved not to have the ability or the aptitude to complete the course within a reasonable time to discontinue the course. There is no warrant for restricting the expression maintenance of the standards only to matters such as minimum attendance, length of the course and prescription of minimum academic attainments.

Appeals by Special Leave from the Judgment and order dated 31st January, 1962 of the Mysore High Court in Writ Petitions Nos. 940 and 1056 of 1961.

*G. S. Pathak*, Senior Advocate, (*M/s. Rajinder Narain & Co.*, Advocates), for Appellants.

*R. Gopalakrishnan*, Advocate, for Respondents.

The Judgment of the Court was delivered by

*Shah, J.*—These appeals raise the question whether the Academic Council of the Mysore University was competent in exercise of the powers conferred by sections 22, 23 and 43 of the Mysore University Act XXIII of 1956 to frame clause 3 (c) of the Regulations relating to the grant of the degree for Bachelor of Veterinary Science (B.V.Sc.). The Mysore University Act XXIII of 1956—hereinafter referred to as 'the Act'—was enacted to provide for the reorganisation of the University of Mysore and other incidental matters. The powers of the University are described in section 4. Section 21 provides for the constitution of the Academic Council—which is one of the authorities of the University designated under section 13—and section 22 sets out the powers of the Academic Council. It provides :

"The Academic Council shall, subject to the provisions of this Act, have the control and general regulation of teaching, courses of studies to be pursued, and maintenance of the standards thereof and shall exercise such other powers and perform such other duties as may be prescribed."

By section 23 other powers of the Academic Council are prescribed. In so far as it is material, the section provides :

"In particular and without prejudice to the generality of the powers specified in section 22, the Academic Council shall have, subject to the provisions of this Act, the following powers namely :—

- |     |   |   |   |   |   |   |   |
|-----|---|---|---|---|---|---|---|
| (a) | * | * | * | * | * | * | * |
| (b) | * | * | * | * | * | * | * |

(c) to make Regulations relating to courses, schemes of examinations and conditions on which students shall be admitted to the examinations, degrees, diplomas, certificates and other academic distinctions."

Section 43 of the Act sets out the scope of the Regulations. It enacts :

"Subject to the provisions of this Act, the Regulations may provide for the exercise of all or any of the powers, enumerated in sections 22 and 23 of this Act and for the following matters, namely :—

- (i) the admission of students to the University ;
- (ii) the recognition of the examinations and degrees of other Universities as equivalent to the examinations and degrees of the University ;
- (iii) the University courses and examinations and the conditions on which students of the University and affiliated colleges and other University institutions shall be admitted to examinations for the degrees, diplomas and certificates of the University ; and
- (iv) the granting of exemptions."

In exercise of the powers conferred by sections 22, 23 and 43, the Academic Council made Regulations relating to the grant of a degree for Bachelor of Veterinary Science. Clause 3 (c) of the Regulations is as follows :

"No candidate who fails four times shall be permitted to continue the course."

The Mysore Veterinary College, Hebbal, Bangalore, is one of the colleges affiliated to the University of Mysore for training students for the degree course in Bachelor of Veterinary Science (B.V.Sc.).

These two appeals arise on facts which are closely parallel. Gopala Gowda—respondent in C.A. No. 565 of 1963—was admitted in the year 1958 as a student in the First Year Course in the Mysore Veterinary College. Gopala Gowda was declared unsuccessful in four successive First Year Course examinations. The Controller of Examinations, Mysore University, then informed Gopala Gowda by letter dated 2nd August, 1961 that "he had lost" his right to continue studies for the Bachelor of Veterinary Science (B.V.Sc.) course under Regulation 3 (c) of the Regulations governing the course of study framed by the University leading to the degree of the Bachelor of Veterinary Science (B.V.Sc.) Gopala Gowda then presented a petition in the High Court of Mysore praying that, for reasons set out in his affidavit, the High Court do issue a writ quashing the order communicated

by the Controller of Examinations in his letter dated 2nd August, 1961 and do further direct the University of Mysore and the Controller of Examinations to permit him to appear for the subsequent examinations and to prosecute his training for the Bachelor of Veterinary Science Course. The other respondent Bheemappa Reddy had also failed to satisfy the examiners in four successive First Year Course examinations commencing from April, 1959, and on being intimated by the Controller of Examinations that he will not be permitted to continue his training for the Bachelor of Veterinary Science (B V Sc) Course under Regulation 3 (c) he filed a similar Writ Petition in the High Court.

The High Court of Mysore held that Regulation 3 (c) of the Regulations governing the course of study leading to conferment of the degree of Bachelor of Veterinary Science of the Mysore University could not be said 'to subserve the purpose of maintaining the standards mentioned in section 22 of the Mysore University Act' and on that account was beyond the competence of the Academic Council or the University and those bodies had no power to prevent Gopala Gowda and Bheemappa from prosecuting their studies and from appearing at the subsequent examinations. With Special Leave, the University of Mysore, the Controller of Examinations and the Principal of the Mysore Veterinary College, have appealed.

In the view of the High Court, under section 22 of the Act the Academic Council could prescribe minimum qualifications for admission to a degree course in an affiliated college, and also could prescribe standards which qualify a candidate for admission to the degree or academic distinction, but the Council had not the power to prescribe a condition on the satisfaction of which a student admitted to the Course could prosecute his study in the course to which he had been admitted. Power to frame Regulations for "maintenance of standards" within the meaning of section 22 and prescribing conditions on which a student shall be admitted to an examination within the meaning of section 23 (3) (c) did not, in the opinion of the High Court, import power to make Regulation preventing a student admitted to a course from prosecuting his study, for the only consequence of failure in an examination is that the student does not qualify himself for admission to the degree sought by him and the University would be entitled to withhold conferment of the degree, but not to obstruct the prosecution of the course of study. The expression "maintenance of standards" in the view of the High Court could only take in considerations such as undergoing a course of study and keeping a prescribed minimum attendance in an institution maintained or recognised by the University, but it does not and

cannot be taken to mean that by reason only of the fact that a student has not attained the standard of knowledge or proficiency required for passing the examination within that period he can be said to be for all times incapable of attaining that standard.

The High Court proceeded to observe

'The power to maintain certain standards before a degree or other academic distinction is conferred upon a person involves the power to withhold the conferment of that degree unless a person attains the necessary standard but it cannot either in logic or in justice involve the power to refuse to permit a person to attain that standard. That power can and should be exercised at the time of admission into the course of study if the University is of the opinion that the applicant for admission is not fit to be admitted into the course of study. It must be held to have entertained the opinion that he does not have the minimum suitability to take that course which means that he has the capacity by undergoing the course of study to attain the standard necessary for receiving the degree.

We are unable to agree with the view expressed by the High Court. The Academic Council is invested with the power of controlling and generally regulating teaching courses of studies to be pursued and maintenance of the standards thereof, and for those purposes the Academic Council is competent to make regulations amongst others relating to the courses, schemes of examinations and conditions on which students shall be admitted to the examinations, degrees diplomas certificates and other academic distinctions. The Academic Council is thereby invested with power to control the entire academic life of the student from the stage of admission to a course of study to the ultimate conferment of a degree or academic

distinction. Admission to a course or branch of study depending upon possession of the minimum qualifications prescribed does not divest the Academic Council of its control over the academic career of the student, for the Council has for maintaining standards the power to prescribe schemes of examinations, and also to prescribe conditions on which students shall be admitted to the examinations. Power to prescribe conditions on which a student may be admitted to the examinations, in our opinion, necessarily implies the power to refuse to admit a student in certain contingencies, for the power to admit to an examination implies the power to weed out students who have on the application of a reasonable test proved themselves to be unfit to continue the course or prosecute training in that course. If on account of general inaptitude for being trained in a course or on account of supervening disability to prosecute a course of study, a student admitted to that course is found by the Academic Council to be unfit to prosecute his training, it would, in our judgment, be within the power of the Academic Council, in exercise of its authority to control and maintain standards, and also of its authority to prescribe conditions on which students may be admitted to examinations, to direct that the student shall discontinue training in that course. And failure by a student to qualify for promotion or degree in four examinations, is certainly a reasonable test of such inaptitude or supervening disability. If after securing admission to an institution imparting training for professional courses, a student may be held entitled to continue indefinitely to attend the institution, without adequate application and to continue to offer himself for successive examinations, a lowering of academic standards would inevitably result. Power to maintain standards in the course of studies, in our judgment, confers authority not merely to prescribe minimum qualifications for admission, courses of study and minimum attendance at an institution which may qualify the student for admission to the examination, but also authority to refuse to grant a degree, diploma, certificate or other academic distinction to students who fail to satisfy the examiners at the final examination, and to direct that a student who is proved not to have the ability or the aptitude to complete the course within a reasonable time to discontinue the course. There is no warrant for restricting the expression "maintenance of the standards" only to matters such as minimum attendance, length of the course and prescription of minimum academic attainments.

The High Court was therefore in error in holding that the Academic Council had no power to prescribe Regulation 3 (c). We are informed at the Bar, however, that since the High Court decided the case on 31st January, 1962, the two respondents were permitted to continue their courses of study and they have appeared for the subsequent examinations and they were declared to have duly passed their second and third year examinations and have been permitted to keep terms for the degree examination. Even though, the view taken by the High Court was erroneous we do not think, having regard to the fact that the respondents were permitted to continue their course of study, the University not having applied for any interim orders pending disposal of these appeals, that any order should be passed in these appeals so as to deprive the respondents of the training they have received.

These appeals are filed with Special Leave, and in the exceptional circumstances of the case, we do not think we would be justified, merely because we disagree with the interpretation of the High Court of the relevant regulation, in making an effective order against the respondents so as to nullify the results declared by the University concerning them in respect of the second and third year examinations.

The appeals are therefore dismissed. There will be no order as to costs.

K.S.

*Appeals dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction)

PRESENT —K N WANCHOO, J R MUDHOLKAR AND S M. SIKRI, JJ  
 R S Maddanappa (deceased) after him by his legal representatives .. Appellants\*

Chandramma and another

Respondents

*Evidence Act (I of 1872), section 115—Estoppel by representation—No estoppel against person who knows the true state of facts*

*Transfer of Property Act (IV of 1882) section 51—Compensation for improvements—Cannot be claimed by person effecting improvements on property knowing that he has no right to such property*

*Civil Procedure Code (V of 1908) section 99 and Order 20, rule 12—Suit by plaintiff—Decree in favour of one of the defendants and against the other defendants—Interference by appellate Court on ground that a decree cannot be passed in favour of a defendant who has not asked for transposition as plaintiff—Bar of section 99—Applicability—Award of mesne profits to a person who has not asked for the same—Legality*

*Constitution of India (1950), Article 133—Appeal to Supreme Court—New Case cannot be set up for the first time*

The plaintiff sister of 1st defendant instituted a suit against her father (second defendant) and his second wife and her children (defendants 3 to 8) for a declaration that she was the owner of a half share in the suit properties which were in the possession of defendants 2 to 8 and for partition and separate possession of half share and for mesne profits. According to the plaintiff the properties were the absolute properties of her mother, first wife of the second defendant, and upon her death the properties devolved on her and the first defendant as her mother's heirs. Since the first defendant did not want to join her as co-plaintiff she was joined as a defendant. Before filing the suit the plaintiff sent a notice to the first defendant stating that the plaintiff and the first defendant were joint owners of the suit properties which were in the possession of their father and requested the co-operation of the 1st defendant in order to effect a division of the properties. The first defendant sent no reply. A few years earlier the 1st defendant had written a letter to her step-mother wherein she stated, *inter alia*, "I have no desire whatsoever in respect of the (suit) properties. . . Everything belongs to my father. We give our consent to anything done by our father". Later the first defendant and her husband attempted a will executed by defendant No 2 purporting to make a disposal of the suit properties in favour of defendants 3 to 8. In the suit filed by the plaintiff, however, the first defendant admitted the claim of the plaintiff and also claimed a decree against the other defendants in respect of her half share in the suit properties. The trial Court decreed the claim of the plaintiff but held that the first defendant was estopped by her conduct from claiming her half share. The High Court on appeal while confirming the decree passed in favour of the plaintiff held that the 1st defendant would also be entitled to a similar decree and passed a decree in her favour for possession of her half share with future mesne profits.

In the present appeal filed against the order of the High Court pertaining to the first defendant alone it was contended (i) the first defendant was estopped by her conduct from claiming possession of her alleged half share of the suit properties and if she was not so estopped she must at least be made to pay for the improvements effected on the properties by defendant No 2, (ii) no decree can be passed in favour of a defendant who has not asked for transposition as plaintiff in the suit, and (iii) it is not open to a Court to award future mesne profits to a party who did not claim them in the suit.

*Held* (1) the first defendant was not estopped by her conduct from claiming her half share in the suit properties.

The conduct of the first defendant in not replying to the notice of the plaintiff and in not co-operating with the plaintiff in instituting the suit would not justify the inference of estoppel. It did not mean that she impliedly admitted that she had no interest in the suit properties.

Nor could the statements contained in the letter written by the first defendant to her step-mother assist defendants 2 to 8 because the father knew that the properties did not belong to him and that he had no authority to deal with them. The father's possession must therefore be deemed to have been, to his knowledge, on behalf of the plaintiff and the first defendant. There was thus no possibility of an erroneous belief about his title being created in the mind of defendant No 2 because of what the first defendant had said in her letter to her step-mother.

The attestation of the will by the first defendant and her husband would no doubt affix them with knowledge of what the father was doing, but it cannot operate as estoppel against them. The will would take effect only upon the death of the father and therefore no interest in the property had at all accrued to defendants 3 to 8 even on the date of the suit. So far as the father was concerned he knew the true position and therefore, could not say that an erroneous belief about his title to the properties was created in his mind by reason of the conduct of the first defendant attesting the document.

The object of estoppel is to prevent fraud and secure justice between the parties by promotion of honesty and good faith. Therefore where one person makes a misrepresentation to the other about the truth would not be shut out by the rule of estoppel if that others knew the true state of facts and must consequently not have been misled by the misrepresentation. Thus the person who sets up an estoppel against the other must show that his position was altered by reason of the representation or conduct of the later and unless he does that even the general principle of estoppel cannot be invoked by him.

(2) Defendant No. 1 could not also be made liable to pay for the improvements alleged to have been effected on the suit properties. No man who, knowing fully well that he has no title to property spends money on improving it can be permitted to deprive the original owner of his right to possession of the property except upon the payment for the improvements which were not effected with the consent of that person.

(3) Section 99 of the Civil Procedure Code (V of 1908) would be a bar to interfere with the decree passed by the High Court in favour of the first defendant on the technical ground that no decree can be passed in favour of a defendant who has not asked for transposition as a plaintiff; and

(4) the award of future mesne profits in the instant case could not be attacked on the ground that the first defendant did not ask for the same. The plaintiff claimed not only partition and separate possession of her half share of the properties but also mesne profits. Defendant No. 1 admitted the plaintiff's claim and had in substance prayed for a similar decree in her favour.

*Quære* : Whether future mesne profits can be awarded to a party who has not made a claim in respect of them?

*Mohd. Amin and others v. Vakil Ahmed and others*, 1952 S C R. 1133, held required reconsideration.

*Obiter* : Past mesne profits cannot be awarded to a successful party to a suit for possession unless a claim was made in respect of them.

A case of family settlement which was never set up before the lower Courts cannot be set up for the first time before the Supreme Court.

Appeal from the Judgment and Decree, dated 19th February, 1959, of the Mysore High Court in Regular Appeal No. 208 of 1951-52.

*S. K. Venkatarangaiengar* and *A. G. Ratnaparkhi* Advocates, for Appellants.

*S. T. Desai*, Senior Advocate (*Naunit Lal*, Advocate with him), for Respondent No. 1.

*K. K. Jain*, Advocate, for Respondent No. 2.

The Judgment of the Court was delivered by

*Mudholkar, J.*—This is an appeal by defendants Nos. 3 to 8 from a decision of the High Court of Mysore passing a decree in favour of respondent No. 1 who was defendant No. 1 in the trial Court, for possession of half the property which was the subject-matter of the suit and also allowing future mesne profits.

The relevant facts are briefly these : The plaintiff who is the elder sister of the first defendant instituted a suit in the Court of the District Judge, Bangalore for a declaration that she is the owner of half share in the properties described in the schedule to the plaint and for partition and separate possession of half share and for mesne profits. According to her the suit property was the absolute property of her mother Puttananjamma, and upon her death this property devolved on her and the first defendant as her mother's heirs. Since, according to her, the first defendant did not want to join her as co-plaintiff in the suit, she was joined as a defendant. It is common ground that the property was in the possession of the second defendant, R. S. Maddanappa, the father of the plaintiff and the first defendant and Gangavva, the second wife of Maddanappa and her children.



Maddanappa died during the pendency of the appeal before this Court and his legal representatives are the other defendants to the suit. Briefly stated his defence which is also the defence of the defendants other than defendant No. 1 is that though the suit properties belonged to Gowramma the mother of Puttananjamma she had settled them orally on the latter as well as on himself and that after the death of Puttananjamma he has been in possession of those properties and enjoying them as full owner. He further pleaded that it was the last wish of Puttananjamma that he should enjoy these properties as absolute owner. The plaintiff and the first defendant had according to him expressly and impliedly abandoned their right in these properties that his possession over the properties was adverse to them and as he was in adverse possession for over the statutory period the suit was barred. Finally he contended that he had spent more than Rs. 46,000 towards improvements of the properties which was met partly from the income of his joint ancestral property and partly from the assets of the third defendant. These improvements he alleged were made by him *bona fide* in the belief that he had a right to the suit properties and consequently he was entitled to the benefit of the provisions of section 51 of the Transfer of Property Act.

The first defendant admitted the claim of the plaintiff and also claimed a decree against the other defendants in respect of her half share in the suit properties. The other defendants however resisted her claim and in addition to what the second defendant has alleged in his written statement contended that she was estopped by her conduct from claiming any share in the properties.

The trial Court decreed the claim of the plaintiff but held that the first defendant was estopped from claiming possession of her half share in the properties left by her mother. The first defendant preferred an appeal before the High Court challenging the correctness of the decision of the trial Court. The other defendants also filed an appeal before the High Court challenging the decision of the trial Court in favour of the plaintiff. It would appear that the plaintiff had also preferred some cross-objections. All the matters were heard together in the High Court which dismissed the appeal preferred by defendants Nos. 2 to 8 as well as the cross-objections lodged by the plaintiff but decreed the appeal preferred by the first defendant and passed a decree in her favour for possession of her half share in the suit properties and future mesne profits against the remaining defendants. Defendants Nos. 2 to 8 applied for a certificate from the High Court under Articles 133 (1) (a) and 133 (1) (c) in respect of the decree of the High Court in the two appeals. The High Court granted the certificate to defendants Nos. 2 to 8 in so far as defendant No. 1 was concerned but refused certificate in so far as the plaintiff was concerned. We are therefore concerned with a limited question and that is whether the High Court was right in awarding a decree to the first defendant for possession of her half share and mesne profits.

Mr. Venkatarangaiengar who appears for the appellants accepts the position that as the certificate was refused to defendants Nos. 2 to 8 in so far as the plaintiff is concerned the only points which they are entitled to urge are those which concern the first defendant alone and no other. The points which the learned Counsel formulated are as follows:

- (1) It is not open to a Court to award future mesne profits to a party who did not claim them in the suit.
- (2) No decree can be passed in favour of a defendant who has not asked for transposition as plaintiff in the suit.
- (3) That the first defendant was estopped by her conduct from claiming possession of her alleged half share of the properties.

We will consider the question of estoppel first. The conduct of the first defendant from which the learned Counsel wants us to draw the inference of estoppel consists of her attitude when she was served with a notice by the plaintiff her general attitude respecting Bangalore properties as expressed in the letter dated

17th January, 1941, written by her to her step mother and the attestation by her and her husband on 3rd October, 1944, of the will executed on 25th January, 1941 by Maddanappa. In the notice dated 26th January, 1948, by the plaintiff's lawyer to the first defendant it was stated that the plaintiff and the first defendant were joint owners of the suit properties which were in the possession of their father and requested for the co-operation of the first defendant in order to effect the division of the properties. A copy of this notice was sent to Maddanappa and he sent a reply to it to the plaintiff's lawyers. The first defendant however sent no reply at all. We find it difficult to construe the conduct of the first defendant in not replying to the notice and in not co-operating with the plaintiff in instituting a suit for obtaining possession of the properties as justifying the inference of estoppel. It does not mean that she impliedly admitted that she had no interest in the properties. It is true that in Exhibit 15, which is a letter sent by her on 17th January, 1941, to her step-mother she has observed thus :

"I have no desire whatsoever in respect of the properties which are at Bangalore. Everything belongs to my father. He has the sole authority to do anything.... We give our consent to anything done by our father. We will not do anything."

But even these statements cannot assist the appellants because admittedly the father knew the true legal position. That is to say, the father knew that these properties belonged to Puttananjamma and that he had no authority to deal with these properties. No doubt, in his written statement Maddanappa had set up a case that the properties belonged to him by virtue of the declaration made by Puttananjamma at the time of her death, but that case has been negatived by the Courts below. The father's possession must, therefore, be deemed to have been, to his knowledge, on behalf of the plaintiff and the first defendant. There was thus no possibility of an erroneous belief about his title being created in the mind of Maddanappa because of what the first defendant had said in her letter to her step-mother.

In so far as the attestation of the will is concerned, the appellants' position is no better. This 'will' purports to make a disposition of the suit properties along with other properties by Maddanappa in favour of defendants Nos. 3 to 8. The attestation of the will by the first defendant and her husband, would no doubt affix them with the knowledge of what Maddanappa was doing, but it cannot operate as estoppel against them and in favour of defendants Nos. 3 to 8 or even in favour of Maddanappa. The will could take effect only upon the death of Maddanappa and, therefore, no interest in the property had at all accrued to the defendants Nos. 3 to 8 even on the date of the suit. So far as Maddanappa is concerned, he, as already stated, knew the true position and therefore, could not say that an erroneous belief about his title to the properties was created in his mind by reason of the conduct of the first defendant and her husband in attesting the document. Apart from that there is nothing on the record to show that by reason of the conduct of the first defendant Maddanappa altered his position to his disadvantage.

Mr. Venkatarangaiengar, however, says that subsequent to the execution of the will he had effected further improvements in the properties and for this purpose spent his own moneys. According to him, he would not have done so in the absence of an assurance like the one given by the first defendant and her husband to the effect that they had no objection to the disposition of the suit properties by him in any way he chose to make it. The short answer to this is that Maddanappa on his own allegations was not only in possession and enjoyment of these properties ever since the death of Puttananjamma but had made improvements in the properties even before the execution of the will. In these circumstances, it is clear that the provisions of section 115 of the Indian Evidence Act, which contain the law of estoppel by representation do not help him.

Mr. Venkatarangaiengar, however, wanted us to hold that the law of estoppel by representation is not confined to the provisions of section 115 of the Evidence Act, that apart from the provisions of this section there is what is called "equitable estoppel" evolved by the English Judges and that the present case would come

within such "equitable estoppel" In some decisions of the High Courts reference has been made to "equitable estoppel" but we doubt whether the Court while determining whether the conduct of a particular party amounts to an estoppel, could travel beyond the provisions of section 115 of the Evidence Act As was pointed out by Garth, C J, in *Ganges Manufacturing Co v Saurymull*<sup>1</sup>, the provisions of section 115 of the Evidence Act are in one sense a rule of evidence and are founded upon the well known doctrine laid down in *Pickard v Sears*<sup>2</sup>, in which the rule was stated thus

\* Where one by his word or conduct wilfully causes another to believe the existence of a certain state of thing and induced him to act on that belief so as to alter his own previous position the former is concluded from averring against the latter a different state of things as existing at the first time

The object of estoppel is to prevent fraud and secure justice between the parties by promotion of honesty and good faith Therefore, where one person makes a misrepresentation to the other about a fact he would not be shut out by the rule of estoppel, if that other person knew the true state of facts and must consequently not have been misled by the misrepresentation

The general principle of estoppel is stated thus by the Lord Chancellor in *Cairncross v Lorimer*<sup>3</sup>

The doctrine will apply which is to be found I believe in the laws of all civilized nations that if a man either by words or by conduct has intimated that he consents to an act which has been done and that he will offer no opposition to it although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained he cannot question the legality of the act he had so sanctioned to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct I am of opinion that, generally speaking if a party having an interest to prevent an act being done has full notice of its being done and acquiesces in it so as to induce a reasonable belief that he consents to it and the position of others is altered by their giving credit to his sincerity he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license

It may further be mentioned that in *Carr v London and N W Ry Co*<sup>4</sup>, four propositions concerning an estoppel by conduct were laid down by Brett, J, (afterward Lord Esher) the third of which runs thus

If a man either in express terms or by conduct makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way and it be acted upon in the belief of the existence of such a state of facts to the damage of him who so believes and acts the first is estopped from denying the existence of such a state of facts

This also shows that the person claiming benefit of the doctrine must show that he has acted to his detriment on the faith of the representation made to him

This was quoted with approval in *Sarad v Gopal*<sup>5</sup> It will thus be seen that here also the person who sets up an estoppel against the other must show that his position was altered by reason of the representation or conduct of the latter and unless he does that even the general principle of estoppel cannot be invoked by him As already stated no detriment resulted to any of the defendants as a result of what the defendant No 1 had stated in her letter to her step-mother or as a result of the attestation by her and her husband of the will of Maddanappa.

Mr Venkatarangauengar then tried to urge before us that it was a case of family settlement by the father with a view to avoid disputes amongst his heirs and legal representatives after his death and therefore, the actions of defendant No 1 can be looked at as acquiescence in the family settlement effected by the father A case of family settlement was never set up by the defendants either in the trial Court or in the High Court and we cannot allow a new case to be set up before us for the first time

Finally on this aspect of the case the learned Counsel referred to the observations of Lord Granworth in *Ramsden v Dyson*<sup>6</sup>, which are as follows

1 (1880) 11 L.R. 5 Cal 669

2 1832 A. & E. 469

3 3 H.L.C. 829

4 L.R. 10 Q.P. 307

5 L.R. (1892) 19 I.A. 203

6 L.R. 1 H.L. App. 129 (130)

"If a stranger begins to build on my land supposing it to be his own and I (the real owner) perceiving his mistake, abstain from setting him right and leave him to persevere in his error, a Court of Equity will not allow me afterwards to assert my title to the land, on which he has expended money on the supposition, that the land was his own. It considers that when I saw the mistake in which he had fallen, it was my duty to be active and to state his adverse title; and that it would be dishonest in me to remain wilfully passive on such an occasion in order afterwards to profit by the mistake which I might have prevented."

The doctrine of acquiescence cannot afford any help to the appellants for the simple reason that Maddanappa who knew the true state of affairs could not say that any mistaken belief was caused in his mind by reason of what the first defendant said or did. According to the learned Counsel, even if the first defendant's claim to the half share in the suit property cannot be denied to her she must at least be made to pay for the improvements effected by Maddanappa, according to her proportionate share in the suit property. As already stated the appellant was in enjoyment of these properties after his wife's death and though fully aware of the fact that they belonged to the daughters he dealt with them as he chose. When he spent moneys on those properties he knew what he was doing and it is not open to him or to those who claim under him to say that the real owners of the properties or either of them should be made to pay for those improvements. No man who, knowing fully well that he has no title to property spends money on improving it can be permitted to deprive the original owner of his right to possession of the property except upon the payment for the improvements which were not effected with the consent of that person. In our view, therefore, neither was defendant No. 1 estopped from claiming possession of half share of the properties nor can she be made liable to pay half the costs of improvements alleged to have been made by the second defendant.

Now regarding the second point, this objection is purely technical. The plaintiff sued for partition of the suit properties upon the ground that they were inherited jointly by her and by the first defendant and claimed possession of her share from the other defendants who were wrongfully in possession of the properties. She also alleged that the first defendant did not co-operate in the matter and so she had to institute the suit. The first defendant admitted the plaintiff's title to half share in the properties and claimed a decree also in her own favour to the extent of the remaining half share in the properties. She could also have prayed for her transposition as a co-plaintiff and under Order 1, rule 10 (2), Civil Procedure Code, the Court could have transposed her as a co-plaintiff. The power under this provision is exercisable by the Court even *suo motu*. As pointed out by the Privy Council in *Bhupender v. Rajeshwar*<sup>1</sup>, the power ought to be exercised by a Court for doing complete justice between the parties. Here both the plaintiff and the first defendant claim under the same title and though defendants 2 to 8 had urged special defences against the first defendant, they have been fully considered and adjudicated upon by the High Court while allowing her appeal. Since the trial Court upheld the special defences urged by defendants 3 to 8 and negatived the claim of the first defendant it may have thought it unnecessary to order her transposition as plaintiff. But the High Court could, while upholding her claim, well have done so. Apparently it either overlooked the technical defect or felt that under Order 41, rule 33 it had ample power to decree her claim. However that, may be the provisions of section 99 would be a bar to interfere here with the High Court's decree upon a ground such as this.

The only other question for consideration is whether the High Court was justified in awarding mesne profits to the first defendant even though she was not transposed as a plaintiff. According to the learned Counsel mesne profits cannot be awarded to a successful party to a suit for possession unless a claim was made in respect of them. The learned Counsel is right in so far as mesne profits prior to the institution of the suit, that is future mesne profits are concerned, the position is governed by Order 20, rule 12, Civil Procedure Code, which is as follows:—

" (1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the Court may pass a decree—

- (a) for the possession of the property
  - (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits,
  - (c) directing an inquiry as to rent or mesne profits from the institution of the suit until
  - (i) the delivery of possession to the decree-holder,
  - (ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or
  - (iii) the expiration of three years from the date of the decree, whichever event first occurs
- (2) Where an inquiry is directed under clause (b) or clause (c) a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry "

The learned Counsel, however, relied upon the decision of this Court in *Mohd Amin and others v Vakil Ahmed and others*<sup>1</sup>. That was a suit for a declaration that a deed of settlement was void and for possession of the property which was the subject matter of the settlement under that deed. The plaintiffs had not claimed mesne profits, at all in their plaint but the High Court had passed a decree in the plaintiffs' favour not only for possession but also for mesne profits. In the appeal before this Court against the decision of the High Court one of the points taken was that in a case of this kind the Court has no power to award mesne profits. While upholding this contention Bhagwati, J., who delivered the judgment of the Court has observed thus:

The learned Solicitor-General appearing for the plaintiffs conceded that there was no demand for mesne profits as such but urged that the claim for mesne profits would be included within the expression awarding possession and occupation of the property aforesaid together with all the rights appertaining thereto. We are afraid that the claim for mesne profits cannot be included within this expression and the High Court was in error in awarding to the plaintiff its mesne profits though they had not been claimed in the plaint. The provision in regard to the mesne profits will therefore have to be deleted from the decree.

In order to satisfy ourselves whether these observations related to the award of past mesne profits or to the award of future mesne profits we sent for the original record of this Court and we found that the High Court had awarded past as well as future mesne profits. Mr S T Desai, appearing for the respondent No 1 stated that a Full Bench in *Babburu Basavayya and four others v Babburu Guravayya and another*<sup>2</sup> following the decision of the Judicial Committee in *Fakharuddin Mohamed Ahsan v The Official Trustee*<sup>3</sup>, has held that even after the passing of the preliminary decree, it is open to the Court to give appropriate directions, amongst other matters regarding future mesne profits either *suo motu* or on the application of the parties in order to prevent multiplicity of litigation and to do complete justice between the parties. This decision has been followed in a large number of cases. In *Rachepalli Atchamma v Terragunta Ram Reddy*<sup>4</sup>, *Simma Krishnamma v Nakka Latchumanaidu and others*<sup>5</sup>, *Kasibhatla Satyanarayana Sastrulu and others v Kasibhatla Mallikarjuna Sastrulu*<sup>6</sup>, and *Ponnuswami Udayar and another v Santhappa*<sup>7</sup>, the decision of this Court was cited at the Bar and has been considered. The learned Judges have said that the authority of the decision in *Babburu Basavayya and four others v Babburu Guravayya*<sup>2</sup>, is not shaken by what this Court has said. One of the grounds given is that the former relates to a suit for partition while the latter to a suit for possession simpliciter. It is not necessary for us to consider whether the decision of this Court can be distinguished upon this ground but we feel that when a suitable occasion arises it may become necessary to reconsider the decision of this Court as to future mesne profits. In the present case the plaintiff did claim not only partition and separate possession of her half share of the properties but also past mesne profits. The defendant No 1

1 (19 2) S.C.R. 1133 at 1144 (1952) S.C.J. 1A, 197

539 (1953) 1 M.L.J. 6.

2 I.L.R. (1952) Mad 173 (1951) 2 M.L.J.

176

3 I.L.R. (1881) 8 Cal 173 (P.C.) L.R. 8

4 I.L.R. (1957) A.P. 152

5 A.I.R. 1958 A.P. 520

6 A.I.R. 1960 A.P. 45

7 A.I.R. 1963 Mad 171

admitted the plaintiff's claim and in substance prayed for a similar decree in her favour. The decision of this Court would, therefore, not apply to a case like the one before us.

In the result therefore we uphold the decree of the High Court and dismiss the appeal with costs.

V.K.

*Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, RAGHUBAR DAYAL AND V. RAMASWAMI, JJ.

S. Chattanatha Karayalar

.. *Appellant\**

v.

The Central Bank of India, Ltd., and others

.. *Respondents.*

*Contract Act (IX of 1872), section 126—Execution of a joint-promissory note along with two other documents on the same day as security for an overdraft account—Status of one of the signatories to the promissory note if that of co-surety or co-obligant—Determination of—All the documents being parts of same transaction should be read together—Applicability of section 92 of Evidence Act (I of 1872).*

*Deed—Several deeds forming part of one transaction executed on the same day—Construction.*

The plaintiff-bank opened an overdraft account in the name of the first defendant company on the strength of three documents—a promissory note, a letter styled letter of continuity and a deed of hypothecation—executed on the same date. The promissory note executed by the first defendant and two other individuals, defendants 2 and 3, stated: "On demand we....jointly and severally promise to pay (the plaintiff-bank) or order the sum of rupees four lakhs....for value received." The letter of continuity bearing the same date as the promissory note, signed by all the three defendants and sent along with the promissory notes to the plaintiff-bank stated: "We beg to enclose an on demand pro-note for Rs. 4,00,000 signed by us which is given to you as security for the repayment of any overdraft which is at present outstanding in our name and also for the repayment of any overdraft to the extent of Rs. 4,00,000 which we may avail of hereafter and the said pro-note is to be a security to you for the repayment of the ultimate balance of sum remaining unpaid on the overdraft....." The deed of hypothecation executed by the first defendant hypothecating its stock of goods for securing the cash credit account stated, *inter alia*, that the plaintiff agreed to open a cash credit account in favour of defendant No. 1 to the extent of Rs. 4,00,000 at the request of the latter. According to para. 15 of the hypothecation agreement it was to operate as a security for the balance from time to time due to the plaintiff-bank on the cash credit account. Para. 12 stated that if the net sum realised be insufficient to cover the balance due to the plaintiff-bank, defendant No. 1 should pay the balance of the account on production of a statement of account made out from the books of the plaintiff-bank. The plaintiff filed a suit against all the defendants for the recovery of an amount due on the overdraft account. On the question of the status of defendant No. 3 in relation to the transaction of overdraft account,

*Held*, there was an integrated transaction constituted by the three documents executed between the parties on the same date and the legal effect of the documents was to confer on the third defendant the status of a surety and not of a co-obligant.

The principle is well established that if a transaction is contained in more than one document between the same parties they must be read and interpreted together and they have the same legal effect for all purposes as if they are one document.

No doubt in the promissory note all the three defendants jointly and severally promised to pay a sum of rupees 4 lakhs; but the transaction between the parties was contained not merely in the promissory note but also in the letter of continuity and the deed of hypothecation. If the language of the promissory note is interpreted in the context of the other two documents it would be manifest that the status of the 3rd defendant with regard to the transaction of overdraft account was that of a surety and not of a co-obligant.

It is true that section 126 of the Contract Act requires that the creditor must be a party to the contract of guarantee and that under section 132 of the Contract Act the creditor is not bound by any

9th March, 1965.

contract between the co-debtors that one of them shall be liable only on the default of the other even though the creditor is aware of such contract between the co-debtors. But in the present case the plaintiff bank was a party to the contract of guarantee contained in the letter of continuity which was contemporaneous with the promissory note. The requirements of section 126 of the Contract Act were therefore satisfied conferring on defendant No. 3 the status of a surety.

The argument that defendant No. 3 was precluded from giving evidence in regard to a collateral transaction in view of the bar imposed by section 92 of the Evidence Act (I of 1872) and that therefore the terms of the promissory note cannot be altered by any other transaction cannot be accepted. The provisions of section 92 of the Evidence Act can have no application because defendant No. 3 was not attempting to furnish evidence of any oral agreement in derogation of the promissory note but was merely relying on the existence of a collateral agreement in writing which formed part of the same transaction as the promissory note.

Appeal from the Judgment and Decree dated 18th July, 1962, of the Kerala High Court in A S No 561 of 1961.

*S T Desai* Senior Advocate (*MSK Sastri* and *M S Narasimhan*, Advocates, with him), for Appellant.

*G S Pathak*, Senior Advocate, (*B Dutta* and *C Chopra*, Advocates and *J B Dadachany*, *O C Mathur* and *Ravinder Narain*, Advocates of *M/s J B Dadachany & Co*, with him), for Respondent No. 1.

The Judgment of the Court was delivered by

*Ramaswami, J*—This appeal by certificate is brought on behalf of the 3rd defendant against the judgment and decree of the High Court of Kerala dated 18th July, 1962, in A S No 561 of 1961 which affirmed the judgment and decree of the Court of the Subordinate Judge of Alleppey in O S No 114 of 1957.

By a resolution Exhibit BD dated 25th November, 1946 the Board of Directors of the 1st defendant Company authorised the 2nd defendant to obtain financial accommodation from the plaintiff bank to the extent of Rs 15 lakhs under different kinds of loans. Pursuant to this resolution the Company by its letter Exhibit DE dated 26th November, 1946, asked for accommodation for Rs 1 lakh under clean overdraft, for Rs 4 lakhs under open loan and for Rs 10 lakhs under out agency and key loans. On 26th November, 1946 all the three defendants executed a promissory note Exhibit B in favour of the plaintiff bank for a sum of Rs 4 lakhs. The promissory note was sent to the plaintiff bank along with a letter Exhibit A styled letter of continuity dated 26th November, 1946. Exhibit A reads as follows:

"Alleppey, 26th November, 1946

The Agent

The Central Bank of India Limited Alleppey

Dear Sir,

We beg to enclose an on demand pro-note p. Rs 4 00 000 (Rupees four lakhs only) signed by us which is given to you as security for the repayment of any overdraft which is at present outstanding in our name and also for the repayment of any overdraft to the extent of Rs 4 00 000 (Rupees four lakhs only) which we may avail of hereafter and the said pro-note is to be a security to you for the repayment of the ultimate balance of sum remaining unpaid on the overdraft and we are to remain liable to the Pro-note notwithstanding the fact that by payments made into the account of the overdraft from time to time the overdraft may from time to time be reduced or extinguished or even that the balance of the said accounts may be at credit.

Yours faithfully,

for *CASHEW Products Corporation Ltd*,

For General Agencies Ltd (Respondent 2)

(Sd) P S George

Managing Director  
Managing Agents.

Sd/ P S George

(Respondent 3)

Sd/ S Chattanatha Karayalar

(Appellant) \*

Exhibit B states :

"Br. Rs. 4,00,000

Alleppey,  
26th November, 1946.

On Demand we, the Cashew Products Corporation Ltd., S. Chattanatha Karayalar and P. S. George jointly and severally promise to pay the Central Bank of India Limited or order the sum of British Rs. Four lakhs only together with interest on such sum from this date at the rate of two per cent. over the Reserve Bank of India rate with a minimum of five per cent. per annum with quarterly rests for value received.

for CASHEW Products Corporation Ltd,  
for General Agencies Ltd.,  
Sd/. P. S. George,  
(Respondent 2)  
Managing Director,  
Managing Agents.

Sd/. P. S. George  
(Respondent No 3).  
Sd/ S. Chattanatha Karayalar  
(Appellant). "

On the same day, defendant No. 1 as "Borrower" executed in favour of the plaintiff-Bank Exhibit G, a deed of hypothecation of its stock of goods for securing the Demand Cash credit. Exhibit G is to the following effect :

"Hypothecation of Goods to secure a Demand Cash Credit.

No.—

Amount No. 4,00,000

Name. The Cashew Products Corporation, Limited, Quilon.

The Central Bank of India, Limited (hereinafter called 'the Bank') having at the request of the Cashew Products Corporation Ltd., Quilon (hereinafter called 'the Borrowers') opened or agreed to open in the Books of the Bank at Alleppey a Cash Credit account to the extent of Rs. Four lakhs only with the Borrowers to remain in force until closed by the Bank and to be secured by goods to be hypothecated with the Bank it is hereby agreed between the Bank and the Borrowers (the Borrowers agreeing jointly and severally) as follows :—

14. The Borrowers agree to accept as conclusive proof of the correctness of any sum claimed to be due from them to the Bank under this agreement a statement of account made out from the books of the Bank and signed by the Accountant or other duly authorised officer of the Bank without the production of any other voucher, document or paper.

15. That this Agreement is to operate as a security for the balance from time to time due to the Bank and also for the ultimate balance to become due to on the said Cash Credit Account and the said account is not to be considered to be closed for the purpose of this security and the security of hypothecated goods is not to be considered exhausted by reason of the said Cash Credit Account being brought to credit at any time or from time to time or of its being drawn upon to the full extent of said sum of Rs. 4,00,000 if afterwards reopened by a payment to credit.

In witness whereof the Borrowers have hereunto set their hands this twenty-sixth day of November the Christian Year one thousand nine hundred and forty-six.

for GASHEW Products Corporation Ltd ;  
for General Agencies Ltd. ;  
Sd/.....  
Managing Director,  
Managing Agents.

Sd/.

Schedule of goods referred to in the foregoing Instrument, Stocks of cashewnuts, cashew kernels, tin plates, hoopiron and other packing materials stored and or to be stored in the factories at Kochu-  
plamood, Chatthanoor, Ithikara, Vythakuzhi, Paripalli, Palayamkundu and any other factories in  
which we may be storing from time to time and at Cochin awaiting shipment.

for CASHEW Products Corporation Ltd.,  
for General Agencies Ltd. ;  
Sd/.  
Managing Director,  
Managing Agents. "



On the basis of these documents the plaintiff bank opened an overdraft account in the name of defendant No 1. On 21st December 1949 the three documents—Exhibit A, B and G were renewed in identical terms by Exhibits C, D and F. On 1st January 1950 a sum of Rs 3 24 645 12 2 became due to the plaintiff bank and on that date a demand notice—Exhibit O was sent by the plaintiff bank for repayment of the amount. A second notice—Exhibit L was sent by the plaintiff bank on 26th April 1950. On 8th September, 1950 the plaintiff bank brought a suit for the recovery of Rs 2 86 292 11 11 from all the three defendants. The suit was contested by all the defendants. The case of defendant No 1 was that it had sustained loss on account of sudden termination of credit facilities by the plaintiff bank and the amount of loss sustained should be set-off against the claim of the plaintiff bank. Defendants Nos 2 and 3 pleaded that they had executed the promissory notes only as a surety for the 1st defendant and that they are not co-obligants. It was further alleged that the plaintiff bank had granted loan to the 1st defendant in other forms such as Out Agency loans against goods which were security for the open loan. It was said that the plaintiff bank had made adjustments in the open loan account and in the clean overdraft account by debiting and correspondingly crediting in other accounts without the consent of defendants 2 and 3. The plaintiff bank had also allowed defendant No 1 to overdraw freely in the clean overdraft and open loan accounts far beyond the limits agreed upon. It was alleged that the plaintiff bank had converted secured loans into simple loans by releasing goods covered by Bills of Lading against trust receipts and had thereby deliberately frittered away such securities. They contended that they were discharged from obligation as sureties to the contract for these reasons. Upon these rival contentions the learned Subordinate Judge of Alleppey took the view that defendants 2 and 3 were not merely sureties but they were co-obligants because they had executed the promissory notes—Exhibits B and D. In view of this finding the learned Subordinate Judge considered it unnecessary to go into the question whether defendant No 3 was absolved from his liability for all or any reasons set forth in para 5 of the Consolidated Written Statement filed by him. Against the judgment and decree of learned Subordinate Judge Alleppey defendant No 3 presented an appeal in the High Court of Kerala under A.S. No 561 of 1961. Defendants 1 and 2 did not appeal. The appeal was dismissed by the High Court of Kerala on 12th July, 1962. It was held by the High Court that defendant No 3 was a co-obligant and not a surety. On 16th July 1962 defendant No 3 filed C.M.P. No 5032 of 1962 praying that the argument of the appellant with regard to his liability as co-obligant may be expressly dealt within the judgment of the High Court and complaining that the appellant would be seriously prejudiced if the omission was allowed to remain. Thereupon the learned Judges of the High Court wrote a supplementary judgment on 18th July, 1962, rejecting the further arguments addressed on behalf of the appellant.

The first question presented for determination in this case is whether the status of the 3rd defendant in regard to the transaction of overdraft account is that of a surety or of a co-obligant. It was argued by Mr Desai on behalf of the appellant that the High Court has misconstrued the contents of Exhibits A and B in holding that the 3rd defendant has undertaken the liability as a co-obligant. It was submitted that there was an integrated transaction constituted by the various documents—Exhibits A, B and G executed between the parties on the same day and the legal effect of the documents was to confer on the 3rd defendant the status of a surety and not of a co-obligant. In our opinion the argument put forward on behalf of the appellant is well founded and must be accepted as correct. It is true that in the promissory note—Exhibit B all the three defendants have jointly and severally promised to pay the Central Bank of India Ltd or order a sum of Rs 4 lakhs only together with interest on such sum from this date, but the transaction between the parties is contained not merely in the promissory note—Exhibit B—but also in the letter of continuity dated 26th November 1946—Exhibit A which was sent by the defendants to the plaintiff bank along with promissory note—Exhibit B on the same date. There is another document executed by defendant No 1 on 26th November, 1946—Exhibit G—Hypothecation agreement. The principle is well

established that if the transaction is contained in more than one document between the same parties they must be read and interpreted together and they have the same legal effect for all purposes as if they are one document. In *Manks v. Whiteley*<sup>1</sup>, Moulton, L.J., stated :

“Where several deeds form part of one transaction and are contemporaneously executed they have the same effect for all purposes such as are relevant to this case as if they were one deed. Each is executed on the faith of all the others being executed also and is intended to speak only as part of the one transaction, and if one is seeking to make equities apply to the parties they must be equities arising out of the transaction as a whole.”

It should be noted in the present case that the promissory note—Exhibit B—was enclosed by the defendants along with the letter of continuity—Exhibit A before sending it to the plaintiff-bank. In the letter—Exhibit A it is clearly stated that the promissory note Exhibit B was given to the plaintiff-bank “as security for the repayment of any overdraft to the extent of Rs. 4,00,000”. It is further stated in Exhibit A that “the said promissory note is to be a security to you for the repayment of the ultimate balance or sum remaining unpaid on the overdraft”. In the hypothecation agreement—Exhibit G it is stated that the plaintiff-bank has agreed to open a Cash Credit account to the extent of Rs. 4 lakhs at the request of the Cashew Products Corporation Ltd., Quilon. According to para. 15 of the hypothecation agreement it operates as a security for the balance due to the plaintiff-bank on the Cash Credit account. Para. 12 of the hypothecation agreement states that if the net sum realised be insufficient to cover the balance due to the plaintiff-bank, defendant No. 1 should pay the balance of the account on production of a statement of account made out from the books of the bank as provided in the 14th clause. Under this clause defendant No. 1 agreed to accept as conclusive proof of the correctness of any sum claimed to be due from it to the bank a statement of account made out from the books of the Bank and signed by the Accountant or other duly authorised officer of the Bank without the production of any other document. If the language of the promissory note—Exhibit B is interpreted in the context of Exhibits A and G it is manifest that the status of the 3rd defendant with regard to the transaction was that of a surety and not of a co-obligant. This conclusion is supported by letters—Exhibits AF, dated 27th November, 1947, and AM, dated 17th December, 1947, in which the Chief Agent of the plaintiff-bank has addressed defendant No. 3 as the “guarantor”. There are similar letters of the plaintiff-bank, namely, Exhibits CE, dated 28th December, 1947, CG, dated 13th January, 1948, AS, dated 23rd February, 1949, V, dated 21st October, 1949, III, dated 16th December, 1949, IV, dated 12th January, 1950 and O dated 29th March, 1950 in which defendant No. 3 is referred to either as a “guarantor” or as having furnished a guarantee for the loan. Our concluded opinion, therefore, is that the status of the 3rd defendant with regard to the overdraft account was that of a surety and not of co-obligant and the finding of the High Court on this issue is not correct.

On behalf of respondent No. 1 Mr. Pathak stressed the argument that there is no contract of suretyship in the present case in terms of section 126 of the Contract Act and the plaintiff-bank is not legally bound to treat the 3rd defendant merely in the character of a surety. Mr. Pathak relied upon the decision of the Madras High Court in *Vyavan Chelliar v. Official Assignee of Madras*<sup>2</sup>, in which it is pointed out that persons who are jointly and severally liable on promissory notes are not sureties under section 126 of the Contract Act, nor do such persons occupy a position analogous to that of a surety strictly so called to attract the provisions of section 141 of the Contract Act. Reference was made, in this connection, to the decision of the House of Lords in *Duncan Fox & Co. v. North & South Wales Bank*<sup>3</sup>, in which Lord Selbourne, L.C., distinguished between three kinds of cases : (1) those in which there is an agreement to constitute, for a particular purpose, the relation of principal and surety, to which agreement the creditor thereby secured is a party ; (2) those in which there is a similar agreement between the principal and surety only, to which the creditor,

1. L.R. (1912) 1 Ch. 735 at 754.

2. I.L.R. 55 Mad. 949 : 63 M.L.J. 615 :

3. L.R. 6 A.C. 1,

is a stranger, and (3) those in which without any such contract of suretyship there is a primary and a secondary liability of two persons for one and the same debt the debt being as between the two that of one of those persons only and not equally of both so that the other if he should be compelled to pay it, would be entitled to reimbursement from the persons by whom (as between the two) it ought to have been paid. It is pointed out by the learned Lord Chancellor that in all these kinds of cases the person who discharged the liability due to the creditor would be entitled to the benefit of the security held by the creditor though a case of suretyship strictly speaking would fall only under class 1 as a contract of guarantee is confined to agreements where the surety agrees with the creditor that he would discharge the liability of the principal debtor in case of his default. It is manifest that classes 2 and 3 are not cases of suretyship strictly so called. Lord Selbourne observed that the case before him did not fall within the first or the second class but it fell within the 3rd class in which strictly speaking there was no contract of suretyship. But the Lord Chancellor held in that case that even in the second and third class of cases the surety has some right to be placed in the shoes of the creditor where he paid the amount. The argument of Mr Pathak was that the position in Indian Law is different and the principles relied upon by Lord Selbourne, L.C. in *Duncan Fox & Co v North & South Wales Bank*<sup>1</sup>, did not apply to the present case. Mr Pathak referred in this connection to the Illustration to section 132 of the Contract Act in support of his argument. We consider that the legal proposition for which Mr Pathak is contending is correct but the argument has not much relevance in the present case. It is true that section 126 of the Contract Act requires that the creditor must be a party to the contract of guarantee. It is also true that under section 132 of the Contract Act the creditor is not bound by any contract between the co-debtors that one of them shall be liable only on the default of the other even though the creditor may have been aware of the existence of the contract between the two co-debtors. In the present case, however, the legal position is different because the plaintiff bank was a party to the contract of guarantee—Exhibit A which is contemporaneous with the promissory note—Exhibit B. The plaintiff bank was also a party to the contract of hypothecation executed by defendant No. 1 in which it is stated that the plaintiff bank had agreed to open a Cash Credit account to the extent of Rs 4 lakhs in favour of defendant No. 1. It is manifest therefore in the present case that the requirements of section 126 of the Contract Act are satisfied and defendant No. 3 has the status of a surety and not of a co-obligant in the transaction of overdraft account opened in the name of defendant No. 1 by the plaintiff bank. On behalf of respondent No. 1 Mr Pathak also referred to the decision in *Venkata Krishnayya v Karnedan Kothari*<sup>2</sup> and submitted that defendant No. 3 cannot be permitted to give evidence in regard to collateral transactions in view of the bar imposed by section 92 of the Evidence Act and his position is as a co-obligant and that the terms of the promissory note cannot be altered by any other transaction. We are unable to accept this argument as correct. The provisions of section 92 of the Evidence Act do not apply in the present case, because defendant No. 3 is not attempting to furnish evidence of any oral agreement in derogation of the promissory note but relying on the existence of a collateral agreement in writing—Exhibits A and G which form parts of the same transaction as the promissory note—Exhibit B. The decision of the Madras High Court in *Venkata Krishnayya v Karnedan Kothari*<sup>2</sup>, is therefore, not applicable and Mr Pathak is not able to make good his submission on this aspect of the case.

It was also contended by Mr Pathak on behalf of respondent No. 1 that the suit is based on the promissory note—Exhibit B against all the three defendants and not on the overdraft account. We do not think there is any substance in this argument. In this connection Mr Pathak took us through the various clauses of the plaint but there is no mention about the promissory note dated 21st December, 1961, except in para 6 of the plaint which recites that the defendant executed a note as security for the repayment of the balance outstanding under

the overdraft". We are satisfied, on examination of the language of the plaint, that the suit is based not upon the promissory note but upon the balance of the overdraft account in the books of the plaintiff-bank. In para. 11 of the plaint the plaintiff-bank asked for a decree against the defendants jointly and severally "for the recovery of Rs. 2,86,292-11-11 as per accounts annexed." In the plaint it is stated that the plaintiff had given two notices to the defendants—Exhibit O dated 1st January, 1950 and Exhibit L, dated 26th April, 1950 but in neither of these notices has the plaintiff referred to the promissory note executed by the defendants or that the suit was based upon the promissory note. On the contrary, the plaintiff-bank referred in Exhibit O to the open loan accounts and asked the defendants to pay the amounts due to the bank under these accounts. It is, therefore, not possible for us to accept the contention of Mr. Pathak that the suit is based upon the promissory note and not upon the amount due on the overdraft account. In this connection, we may incidentally refer to the fact that in its statement of the case before this Court, respondent No. 1 has clearly stated that the claim on the overdraft account against the appellant was valid

"because the overdraft was treated as in favour of all the defendants (appellant and respondents 2 and 3 herein) and that respondent No. 2 was only authorised to operate independently on that account and that the limit under the overdraft was placed at the disposal of respondent No. 2 by an express authority given by all the defendants (the appellant and respondents 2 and 3)."

This shows that respondent No. 1's case is that the suit is based on an overdraft, and since the overdraft was treated as in favour of all the defendants the appellant is liable for the balance due on it.

We shall then consider the question whether defendant No. 2 is discharged of his liability as a surety by reason of the alleged conduct of the plaintiff-bank in violating the terms of the agreement—Exhibit G or by the alleged fraudulent or negligent conduct of the plaintiff-bank in other ways. It was submitted on behalf of the appellant that the plaintiff-bank had made adjustments in the open loan account and in the clean overdraft account with the 1st defendant by debiting and correspondingly crediting in other accounts without the consent of the appellant. It was further alleged that the plaintiff-bank had granted loans to the 1st defendant against goods covered by open loan agreement and that it had converted secured loans into simple loans by releasing goods covered by the Bills of Lading against trust receipts and had thereby deliberately frittered away such securities. The question at issue is a mixed question of law and fact and it is unfortunate that the High Court has not properly dealt with this question or given a finding whether the appellant would be discharged from the liability as a surety for the overdraft account because of the alleged conduct of the plaintiff-bank. We consider it necessary that this case should go back on remand to the High Court of Kerala for deciding the issue and to give proper relief to the parties. In this connection, it is necessary to point out that after the High Court delivered its judgment on 12th July, 1962, an application was made by the learned Advocate appearing for the appellant that some grounds which had been urged by him before the High Court had not been considered by it. The High Court, therefore, adopted the somewhat unusual course of delivering a supplemental judgment. Mr. Desai contends that even the supplemental judgment has failed to consider the appellant's contention that he had been discharged by reason of the fact that adjustments were made by respondent No. 1 indiscriminately in respect of its dealings in three or four different accounts with respondent No. 2 to the prejudice of the appellant. We have broadly indicated the nature of the contention raised by Mr. Desai.

Ordinarily, we do not permit parties to urge that points raised on their behalf in the High Court had not been considered, unless it is established to our satisfaction that the points in question had in fact been urged before the High Court and the High Court, through inadvertence, has failed to consider them. In the present case, we are not prepared to take the view that the grievance made by Mr. Desai is not well-founded. It does appear that after the first judgment was delivered, an application was made by the learned Advocate who argued the appeal himself

before the High Court in which he set out his complaint that some of the points which he had argued before the High Court had not been considered by it. That is why the High Court delivered a supplemental judgment. Aggrieved by the said judgment the appellant filed an application for certificate before the High Court, and in this application again he has taken specific grounds, e.g., under paragraph 6 (k) and paragraph 3 that even the supplemental judgment had failed to consider some of the points urged by him. While granting the certificate, the High Court has made no comment on these grounds. It is to be regretted that when these grounds appear to have been urged before the High Court, the High Court should have failed to deal with them even in its supplemental judgment. That is the reason why we think it is necessary that the matter must go back to the High Court for disposal of the appeal in the light of this judgment.

Mr Pathak, no doubt, seriously contested the validity of Mr Desai's argument. He urged that the adjustments on which Mr Desai has founded his claim for discharge do not really support his case. We propose to express no opinion on this point. As we have just observed, the contention thus raised amounts to a mixed question of fact and law and we do not think it would be expedient for us to deal with it ourselves when the High Court has omitted to consider it.

For these reasons we allow this appeal, set aside the judgment and decree of the High Court of Kerala dated 18th July, 1962 in A.S. No. 561 of 1961 and order that the case should go back for being reheard and redetermined by the High Court in accordance with the observations made in our judgment. The parties will bear their own costs up to this stage.

V K

*Appeal allowed*

## THE SUPREME COURT OF INDIA

(Criminal Appellate Jurisdiction)

PRESENT — K SUBBA RAO, J C SHAH, AND R. S. BACHAWAT, JJ

Vijay Singh

*Appellant\**

The State of Maharashtra

*Respondent*

*Bombay Prohibition Act (XXV of 1949) as amended by Bombay Act (XII of 1959) sections 24 A (2) 66 (1) (b) 66 (2) and 80 (1) (1)—Consuming liquor contained in a medicinal preparation—When not punishable under section 66 (1) (b)—Burden of proof*

*Constitution of India (1950) Article 133—Appeal to Supreme Court—Vero plea—Cannot be raised when there is utter lack of factual basis to sustain the plea*

If a person consumes liquor i.e., any liquid consisting of or containing alcohol, he commits an offence under section 66 (1) of the Bombay Prohibition Act 1949 and is liable to be convicted thereunder. But by reason of section 24 A (2) if it is established that the liquor consumed is contained in any medicinal preparation which is unfit for use as intoxicating liquor the consumption of such liquor is not an offence for the Act itself does not apply to such medicinal preparations. Where the prosecution has proved that the accused has consumed liquor and that the concentration of alcohol in his blood was more than 0.05 per cent weight in volume then in terms of section 66 (2) the burden of proving that the liquor consumed was a medicinal preparation containing alcohol the consumption of which was not contravention of the Bombay Prohibition Act 1949 or the Rules made thereunder shifts to the accused. He can discharge this burden by proving *inter alia* that the medicinal preparation containing alcohol which he had taken was unfit for use as an intoxicating liquor.

The question whether the burden which has shifted to the accused under section 66 (2) was statutorily discharged by reason of the deeming provision contained in section 6-A (7) cannot be raised by accused for the first time before the Supreme Court when there is utter lack of factual basis for drawing the presumption under section 6-A (7) and no attempt was made by the accused to place the relevant material before the Court even after filing the appeal to the Supreme Court or even at the time of arguments.

\* CrL. A. No. 154 of 1963

*Quære* : Whether the condition that the accused should have taken the intoxicant for the purpose of being intoxicated and not for a medicinal purpose is one of the ingredients of the offence under section 85 (1) (1) of the Bombay Prohibition Act, 1949 ?

Appeal from the Judgment and Order, dated 2nd May, 1963 of the Bombay High Court (Nagpur Bench) at Nagpur in Criminal Appeal No. 234 of 1962.

*M. N. Phadke* and *Naunit Lal*, Advocates, for Appellant.

*O. P. Rana*, Advocate and *B. R. G. K. Achar*, Advocate for *R. H. Dhebar*, Advocate, for Respondent.

The Judgment of the Court was delivered by

*Subba Rao, J.*—This appeal by certificate issued by the High Court of Judicature at Bombay raises the question of the construction of some of the provisions of the Bombay Prohibition Act, 1949, hereinafter called the Act.

On 12th June, 1961, Vijaysingh, the appellant, and one Namdeo Shinde drove in a jeep at an excessive speed and dashed it against the wall of the office of the District Superintendent of Police, Akola. Both of them appeared to be intoxicated. In the jeep there was also a bottle with a label on it as "Tincture Zingiberis". Vijaysingh was prosecuted before the Judicial Magistrate, First Class, Akola, under section 66 (1) (b) and section 85 (1) (1), (2) and (3) of the Act. The said Magistrate convicted the appellant both under section 66 (1) (b) and section 85 (1) (1), (2) and (3) of the Act, but sentenced him only under sections 66 (1) (b) and 85 (1) (1) of the Act. On appeal, the learned Sessions Judge, Akola, acquitted the appellant under section 66 (1) (b) of the Act, but confirmed the conviction and sentence under section 85 (1) (1) thereof. Against the judgment of the Sessions Judge acquitting the appellant under section 66 (1) (b) of the Act the State of Maharashtra preferred an appeal to the High Court ; and against the order of conviction under section 85 (1) (1) of the Act the appellant preferred a revision to the High Court. The High Court heard both the matters together and allowed the appeal filed by the State and dismissed the revision petition preferred by the accused-appellant. In the result it set aside the order of acquittal made by the Sessions Judge under section 66 (1) (b) of the Act and sentenced the accused to rigorous imprisonment for 3 months and a fine of Rs. 500 and confirmed the conviction and sentence of the accused under section 85 (1) (1) of the Act. Hence the present appeal.

Learned Counsel for the appellant raised before us several contentions for dislodging the judgment of the High Court. We shall now proceed to deal with them in the order in which they were addressed to us.

The first contention may be put thus. Under section 66 (2) of the Act all that an accused need prove is that he has consumed a medicinal preparation; if he established that, the burden of proving that the medicinal preparation is fit for use as an intoxicating liquor shifts to the prosecution. In the present case the accused has established that he had taken "Tincture Zingiberis" which is a medicinal preparation, but the prosecution failed to prove that it was fit for use as an intoxicating liquor.

To appreciate this contention it is necessary to notice the relevant provisions. Under section 66 (1) of the Act,

"Whoever in contravention of the provisions of this Act, or of any rule, regulation or order made.....any intoxicant shall, on conviction, be punished for a first offence, with imprisonment for a term which may extend to six months and with fine which may extend to one thousand rupees."

"Intoxicant" is defined to mean, among other things, any liquor ; and "liquor" is defined to include, among others, all liquids consisting of or containing alcohol. Under section 13 (b), no person shall consume or use liquor. Relevant part of section 24-A enacts that nothing in Chapter III shall be deemed to apply to any medicinal preparation containing alcohol which is

unfit for use as intoxicating liquor. The effect of these sections, in so far as they are material for the present case is that if a person consumes liquor, i.e., any liquid consisting of or containing alcohol, he commits an offence under section 66 (1) of the Act and, therefore, is liable to be convicted thereunder. But by reason of section 24 A (2) of the Act if it is established that the liquor consumed is contained in any medicinal preparation which is unfit for use as intoxicating liquor, the consumption of such liquor is not an offence under the Act, for the Act itself does not apply to such medicinal preparations. We shall revert to the question of burden of proof a little later.

The facts found in this case may now be noticed. The accused says that he consumed "Tincture Zingiberis" and produced before the police a sample bottle out of which he says he had consumed "Tincture Zingiberis". A sample of the liquid was analysed by the Chemical Analyser. His report shows that the liquor was a weak Ginger Tincture B.P. 1958 (Tincture Zingiberis Mitis), absolute alcohol content was 39.1 per cent V/V. The report further states as regards alcohol content of the liquid that the sample contained 90.0 per cent of V/V of ethyl alcohol though the B.P. limits were 36 to 90 per cent V/V. "The analysis has also given the quantity of total solids as 0.62 per cent weight per ml at 20 degrees to be 0.825 g". In the opinion of the Chemical Analyser, the sample complied with pharmacopoeial specifications. On the basis of the report, the High Court found that the accused consumed a medicinal preparation which was listed in the British Pharmacopoeia 1958 edition and which had alcohol contents to the extent of 90 per cent V/V of ethyl alcohol. The Chemical Analyser to the Government of Maharashtra examined the sample blood taken from the body of the accused by applying 'modified Cavette's method' and gave his report to the effect that the sample blood of the accused contained 0.207 mg per cent W/V of ethyl alcohol. The High Court also found on the expert evidence that blood alcohol concentration on taking a normal dose of Tincture Zingiberis Mitis would be about 0.007 per cent W/V and the accused should have taken roughly about 125 c.c. of Tincture Zingiberis to induce an alcohol content of 0.207 per cent found in his blood by the Chemical Analyser. On the basis of the evidence of Dr. Desmukh, the High Court also found that Tincture Zingiberis Mitis was a preparation which might be consumed for intoxication and that intoxication would not be accompanied by any other harmful effects. On the other hand the accused has not adduced any evidence that the said medicine is a medicinal preparation which is unfit for use as an intoxicating liquor.

The question whether the prosecution has discharged its burden of proof in this case will have to be considered on the basis of the said facts found by the High Court. Section 66 (2) of the Act, which bears on the question of burden of proof reads thus:

Subject to the provisions of sub-section (3) where in any trial of an offence under clause (b) of sub-section (1) for the consumption of an intoxicant it is alleged that the accused person consumed liquor and it is proved that the concentration of alcohol in the blood of the accused person is not less than 0.05 per cent weight in volume then the burden of proving that the liquor consumed was a medicinal or toilet preparation containing alcohol the consumption of which is not in contravention of the Act or any Rules, regulations or orders made thereunder, shall be upon the accused person and the Court shall in the absence of such proof presume the contrary.

It has been proved in this case that the accused person consumed liquor and that the concentration of alcohol in his blood was more than 0.05 per cent weight in volume. So in terms of sub-section (2) of section 66 of the Act the burden of proving that the liquor consumed was a medicinal preparation containing alcohol the consumption of which was not contravention of the Act etc. or the Rules made thereunder, shifted to the accused. He could have discharged this burden by proving, *inter alia* that the medicinal preparation containing alcohol which he had taken was unfit for use as an intoxicating liquor, if so much had been established, as under section 24 A of the Act, the Act itself does not apply to such medicinal preparations. The accused would not have committed any offence under the Act. The High Court found that the accused had not placed any material to prove that Tincture Zingiberis Mitis was unfit for use as an intoxicating liquor, indeed,

it accepted the evidence adduced on behalf of the prosecution and held that it was fit for use as an intoxicating liquor. In this case not only the accused failed to discharge the burden so shifted to him by the statute, but the prosecution had also established that the said medicinal preparation was fit for use as an intoxicating liquor. Reliance is placed by the learned Counsel for the appellant on the decision of this Court in *The State of Bombay (now Gujarat) v. Narandas Mangilal Agarwal*<sup>1</sup>, wherein it was held, in the circumstances of the case, that it was for the State to prove that the medicinal preparation was not unfit for use as intoxicating liquor. But that decision was given on the relevant provisions of the Act before it was amended by the Bombay Act XII of 1959. Section 66 (2) was added by the said Act which in express terms states that in the circumstances mentioned in the sub-section the burden of proof shifts to the accused. The said decision cannot, therefore, be invoked in the changed circumstances. The present case falls to be decided on the interpretation of section 66 (2) of the Act. We, therefore, hold that the High Court came to the correct conclusion on the question of burden of proof and gave its finding on the evidence adduced before it.

It was then argued that even if the burden of proof in the circumstances of the case shifted to the accused that burden was discharged by reason of section 6-A of the Act. Under section 6-A of the Act for the purpose of enabling the State Government to determine whether any medicinal preparation containing alcohol is an article fit for use as intoxicating liquor, the State Government shall constitute a Board of Experts; and under sub-section (6) thereof, it shall be the duty of the Board to advise the State Government on the question whether any article mentioned in sub-section (1) of section 6-A is fit for use as intoxicating liquor and upon determination of the State Government that it is so fit, such article shall, until the contrary is proved, be presumed to be fit for use as intoxicating liquor. Under sub-section (7) thereof,

“Until the State Government has determined as aforesaid any article mentioned in sub-section (1) to be fit for use as intoxicating liquor, every such article shall be deemed to be unfit for such use”.

On the basis of this section, the argument proceeded that the State Government did not determine under section 6-A of the Act that “Tincture Zingiberis Mitis” was fit for use as intoxicating liquor and, therefore, the said article shall be deemed to be unfit for such use, with the result the burden which shifted to the accused under section 66 (2) of the Act was statutorily discharged. There is considerable force in this argument; but unfortunately this point was raised only for the first time before us. There is nothing on the record to show that the State Government has not decided that the said article is fit for use as intoxicating liquor. If this question had been raised at the appropriate time, the relevant material would have been placed before the Court. Even though the argument was raised, no attempt was made even after the filing of the appeal or even at the time of the arguments to place the relevant material before this Court to sustain the said legal argument. We cannot, therefore, permit the appellant to raise the point for the first time before us, particularly when there is utter lack of factual basis.

The next argument of the learned Counsel is that the High Court came to the conclusion it did on irrelevant evidence has no force. It is said that the prosecution did not adduce any evidence to prove that “Tincture Zingiberis Mitis” was not unfit for use as an intoxicating liquor. To state it differently, the argument is that unless it was established by the prosecution that the consumption of a medicinal preparation had no harmful effects on the health of the person consuming it, it could not be said that it was not unfit for use as intoxicating liquor. In the present case the High Court found on the evidence that “Tincture Zingiberis Mitis” was a preparation which might be consumed for intoxication and that intoxication would

1. (1962) M.L.J. (Gr.) 649 : (1962) 2 S.C.J. 542 : (1962) Supp. 1 S.C.R. 15.



not be accompanied by any harmful effects This contention, therefore must be rejected

The last argument turns upon the provisions of section 85 (1) (1) and (2) of the Act The relevant part of section 85 reads

' (1) Whoever in any street or thoroughfare or public place or in any place to which the public have or are permitted to have access--

(1) is drunk and incapable of taking care of himself

(2) In prosecution for an offence under sub-section (1) it shall be presumed until the contrary is proved that the person accused of the said offence has drunk liquor or consumed any other intoxicant for the purpose of being intoxicated and not for a medicinal purpose

It was contended that section 85 of the Act laid down two conditions namely, that the accused should have been drunk and incapable of taking care of himself and also that he should have taken the drink for the purpose of being intoxicated and not for a medicinal purpose This conclusion the argument proceeded would flow from sub-section (2), for otherwise so it was said the presumptive rule of evidence enacted in sub section (2) would be unnecessary and even irrelevant if the purpose mentioned therein was not an ingredient of the offence

This raises an interesting question of law, but, in view of the finding of fact arrived at by the High Court it does not call for a decision in this appeal Assuming without deciding that the argument has some substance, the finding of the High Court satisfies the test suggested by the argument Whatever meaning is given to the expression 'drunk', in this case there is clear evidence that the accused had taken the drink for the purpose of intoxication and not for medication and that under the influence of drink he had rashly driven his jeep into the office of the District Superintendent of Police and dashed it against the wall of that office He was drunk and was, therefore, incapable of taking care of himself On the facts found the High Court rightly held that the accused committed an offence under section 85 (1) of the Act.

In the result, the appeal fails and is dismissed

V K.

*Appeal dismissed*

THE SUPREME COURT OF INDIA.  
(Civil Appellate Jurisdiction.)

PRESENT:—P. B. GAJENDRAGADKAR, *Chief Justice*, J. C. SHAH, S. M. SIKRI,  
V. RAMASWAMI AND P. SATYANARAYANA RAJU, JJ.

B. R. Shankaranarayana and others

.. Appellants\*

v.

The State of Mysore and others  
(In all the Appeals)

.. Respondents.

*Mysore Village Offices Abolition Act (XIV of 1961)—Constitutional validity—Act if void as colourable legislation.*

The Mysore Village Offices Abolition Act (XIV of 1961) being within the competence of the State Legislature, was valid. The Act cannot be held to be a piece of colourable legislation and as such invalid.

Principle of heredity is applicable to the appointment of shanbhogs in the Districts of South Kanara and those offices are also abolished by the Act.

Appeals from the Judgments and Orders, dated the 9th December, 1963, of the Mysore High Court in Writ Petitions Nos. 136, 176, 81, 180, 157 and 177 of 1963, 392 of 1962 and dated 16th January, 1964, in Writ Petition No. 351 of 1963, respectively.

*M. Rama Jois, R. Mahalingier, Ganpat Rai, and S. S. Khanduja*, Advocates of *M/s. Ganpat Rai & Co.*, for Appellants (in C.A. No. 174 of 1965), Appellants Nos. 1 to 5, 7, 8, 10 to 13, 18 to 21, 38 to 51 (in C.A. No. 177 of 1965); Appellants Nos. 1 to 4, 7, 8, 10, 11, 13, 14 (in C.A. No. 181 of 1965); Appellants Nos. 1, 3 to 5, 7 to 16, 18, 19, 21 to 27, 31, 33, 37 to 39, 41 to 46, 49 to 59, 62 to 67, 70, 71 (in C.A. No. 183 of 1965); Appellants Nos. 1 to 12, 14 to 17, 23 to 25, 28, 31 to 36, 38, 40 to 45, 47, 48, 50, 53 (in C.A. No. 186 of 1965) and Appellants (in C.A. No. 194 of 1965).

*S. S. Javali and R. B. Datar*, Advocates, for Appellants Nos. 1 to 3 (in C.A. No. 190 of 1965).

*C. K. Daphtary*, Attorney-General for India (*B. R. L. Iyengar and B. R. G. K. Achar*, Advocates, with him), for Respondent (in all the Appeals).

The Judgment of the Court was delivered by

*Satyanarayana Raju, J.*—These appeals, on certificate granted by the High Court of Mysore, raise the question of the Constitutional validity of the Mysore Village Offices Abolition Act, 1961 (XIV of 1961).

By virtue of the provisions of the States Reorganization Act, 1956, a new State known as the State of Mysore was formed comprising the territories of the then existing State of Mysore, certain districts in the then existing States of Bombay and Hyderabad, South Kanara District in the State of Madras except certain parts thereof and the then existing State of Coorg. The Legislature of the new State of Mysore enacted the Mysore Village Offices Abolition Act, 1961 (XIV of 1961), hereinafter referred to as the Act. It received the assent of the President on 8th July, 1961. Sub-section (3) of section 1 authorised the State Government to fix a date for the commencement of the Act. By notification, dated 9th January, 1963, the Government of Mysore notified that the said Act shall come into force with effect from 1st February, 1963. Immediately after the Act was assented to by the President, the Governor of Mysore, in exercise of the powers vested in him under proviso to Article 309 of the Constitution and other

\*C. As. Nos. 174, 177, 181, 183, 186, 190, 191 and 194 of 1965.

21st January, 1966.

powers enabling him in that behalf, framed Rules called "The Mysore General Service (Revenue Subordinate Branch) Village Accountants (Cadre and Recruitment) Rules, 1961," in order to make recruitment to the posts of Village Accountants. The Rules regulated the pay and other conditions of service of the Village Accountants.

By a notification issued on 6th January, 1963, the Government of Mysore directed the Deputy Commissioners to appoint persons recruited under the Rules and relieve the then holders of their offices and if the number of candidates fell short to continue the existing holders in their post. There was a further direction that other village officers, viz., patels, thottes and talaries whose posts were also abolished under the Act should be continued in their present posts pending consideration by the Government of the question as to whether they should be continued.

The appellants have filed petitions under Article 226 of the Constitution in the High Court of Mysore for the issue of writs of *prohibition* and *certiorari* declaring the impugned Act to be illegal, unconstitutional and void. Among the petitioners who are the village officers of the new State of Mysore are shanbhogs, patels and village karnams. In the writ petitions filed by them, they have impugned the validity of the Act. The grounds raised are common and the reliefs claimed are also identical. In the main, the appellants attack the validity of the Act on the ground that it is a piece of colourable legislation. Para 9 of the affidavit filed in Writ Petition No. 393 of 1962 which is typical of the other writ petitions, states the ground in the following terms:

though the object of the Act is to abolish the offices which are held hereditarily in fact what is being sought to be done is to extinguish the right of the present incumbents and thereafter to appoint persons to be recruited by the State Government. This is evident from the Rules called 'Mysore General Services Rules (Revenue Subordinate Branch) Village Accountants (Cadre and Recruitment) Rules of 1961 dated 29th November, 1961. Thus, the posts are not being abolished but by a colourable exercise of power the respondent is seeking to remove the present incumbents to enable it to appoint persons of his choice. For this reason also the impugned Act and the Rules are illegal *ultra vires* and unconstitutional as being a colourable exercise of power done with the *mala fide* intention of depriving persons like me of our fundamental rights under the Constitution."

We may now examine the provisions of the Act. The Preamble reads:

"Whereas it is expedient in the public interest to abolish the village offices which were held hereditarily before the commencement of the Constitution and the emoluments appertaining thereto in the State of Mysore and to provide for matters consequential and incidental thereto."

Section 2 (1)(e) defines 'emoluments' as meaning (i) lands, (ii) assignments of revenue payable in respect of lands, (iii) fees in money or agricultural produce, and (iv) money, salaries and all other kinds of remuneration granted or continued in respect of, or annexed to, any village office, by the State. Section 2 (1)(g) defines 'holder of a village office' or 'holder' to be a person having an interest in a village office under an existing law relating to such office. Sub-clause (n) of section 2 (1) defines 'village office' as follows:

"village office means every village office to which emoluments have been attached and which was held hereditarily before the commencement of the Constitution under an existing law relating to a village office for the performance of duties connected with the administration or collection of the revenue or with the maintenance of order or with the settlement of boundaries or other matter of civil administration of a village whether the services originally appertaining to the office continue or have ceased to be performed or demanded and by whatsoever designation the office may be locally known."

Section 4 provides for the abolition of all village offices together with the incidents thereof. Sub-section (1) of section 4 provides that all village offices shall be abolished, sub-section (2) that all incidents appertaining to the said village offices shall be extinguished, and sub-section (3) that all land granted or continued in respect of or annexed to a village office by the State shall be resumed and shall be subject to the payment of land revenue as if it were an unalienated land or

ryotwari land. Sections 5 and 6 provide for the regrant of those lands to the holders of the village offices subject to the payment of occupancy price.

Section 7 regulates the eviction of unauthorised holders and regrant to them, in certain circumstances, of land resumed under section 4. Section 7 makes applicable the existing tenancy laws to the lands regranted under sections 5 to 7. Section 9 provides for relief to the holders of village offices abolished under the Act of payment of certain sums in such manner and in such instalments as may be prescribed. Section 11 authorizes the State Government to make Rules for the purpose of carrying out the provisions of the Act. Section 12 provides for the repeal of the enactments specified in Schedule I, which are : The Mysore Village Offices Act, 1908 ; The Madras Hereditary Village Offices Act, 1895 ; The Bombay Hereditary Offices Act, 1874 ; The Bombay Hereditary Offices (Amendment) Act, 1886 ; The Madras Proprietary Estates Village Service Act, 1894 and The Madras Karnams Regulation, 1802.

As already stated after the Act received the assent of the President on 8th July, 1961, the Governor of Mysore, in exercise of the powers conferred by the proviso to Article 309 of the Constitution and the powers vested in him under the various Acts referred to in the notification, made Rules entitled the Mysore General Services (Revenue Subordinate Branch) Village Accountants (Cadre and Recruitment) Rules, 1961. The Rules provide for the recruitment of Village Accountants and their conditions of service. They provide for the creation of a cadre of Village Accountants which shall be district-wise. The Village Accountant is to be the *ex-officio* Panchayat Secretary. Provision is also made in the Rules for the minimum qualifications for recruitment, the method of recruitment of Village Accountants and their training.

Now, Mr. Rama Jois and Mr. R. B. Datar, learned Counsel for the appellants, have not questioned the legislative competence of the Mysore Legislature to enact the impugned Act. That being so, the petitioners can succeed only if they can establish that the provisions of the Act constitute a piece of colourable legislation. In *K. C. Gajapati Narayan Deo v. The State of Orissa*<sup>1</sup> it was contended that the Orissa Estates Abolition Act, 1952, was a piece of colourable legislation and as such void. Dealing with this argument, Mukherjea, J., (as he then was) stated, at page 10 as follows:

"It may be made clear at the outset that the doctrine of colourable legislation does not involve any question of *bona fides* or *mala fides* on the part of the Legislature. The whole doctrine resolves itself into the question of competency of a particular Legislature to enact a particular law. If the Legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if the Legislature lacks competency, the question of motive does not arise at all. Whether a statute is constitutional or not is thus always a question of power. A distinction, however, exists between a Legislature which is legally omnipotent like the British Parliament and the laws promulgated by which could not be challenged on the ground of incompetency, and a Legislature which enjoys only a limited or a qualified jurisdiction. If the Constitution of a State distributes the legislative powers amongst different bodies, which have to act within their respective spheres marked out by specific legislative entries, or if there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the Legislature in a particular case has or has not, in respect to the subject-matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers. Such transgression may be patent, manifest or direct, but it may also be disguised, covert and indirect and it is to this latter class of cases that the expression 'colourable legislation' has been applied in certain judicial pronouncements. The idea conveyed by the expression is that although apparently a Legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears, on proper examination, to be a mere pretence or disguise. As was said by Duff, J., in *Attorney-General for Ontario v. Reciprocal Insurers and others*<sup>2</sup>:

'Where the law making authority is of a limited or qualified character it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what is it that the Legislature is really doing.'

In other words it is the substance of the Act that is material and not merely the form or outward appearance and if the subject-matter in substance is something which is beyond the powers of that Legislature to legislate upon the form in which the law is clothed would not save it from condemnation. The Legislature cannot violate the constitutional prohibitions by employing an indirect method.

In *Gullapalli Nageswara Rao v Andhra Pradesh State Road Transport Corporation*<sup>1</sup> this Court at page 329, after quoting the observations made by Mukherjea J cited above, said as follows:

The legal point on which may be briefly stated thus. The Legislature can only make laws within its legislative competence. Its legislative field may be circumscribed by specific legislative entries or limited by fundamental rights created by the Constitution. The Legislature cannot overstep the field of its competency directly or indirectly. The Court will scrutinize the law to ascertain whether the Legislature by device purports to make law which though in form appears to be within its sphere in effect and substance reaches beyond it. If in fact it has power to make the law its motives in making the law are irrelevant.

On an examination of the material provisions of the impugned Act it is clear that its object and intent is to abolish all the hereditary village offices, viz., patels, shanbhogs, etc., which were held hereditarily before the commencement of the Constitution and the emoluments appurtenant thereto.

In *Dasaratha Rama Rao v State of Andhra Pradesh*<sup>2</sup> this Court held that section 6 (1) of the Madras Hereditary Village Offices Act (III of 1895) in so far as it makes discrimination on grounds of descent only is violative of the fundamental right under Article 16 (2) of the Constitution and is void. There, this Court pointed out that the office of Village Munsif under the said Act was an office under the State within the meaning of clauses (1) and (2) of Article 16. At page 572 it was observed as follows:

"We are of the view that there is nothing in the nature of the office which takes it out of the ambit of clauses (1) and (2) of Article 16 of the Constitution. An office has its emoluments and it would be wrong to hold that though the office is an office under the State, it is not within the ambit of Article 16 because at a time prior to the Constitution the law recognised a custom by which there was a preferential right to the office in the members of a particular family. The real question is—whether that custom which is recognised and regulated by the Act is consistent with the fundamental right guaranteed by Article 16? We do not agree with learned Counsel for respondent 4 that the family had any pre-existing right to property in the shape of emoluments of the office independent or irrespective of the office. If there was no such pre-existing right to property apart from the office then the answer must clearly be that Article 16 applies and section 6 (1) of the Act to so far as it makes a discrimination on the ground of descent only is violative of the fundamental right of the petitioner."

In the territories forming part of the present State of Mysore, in the districts of South Kanara and Coorg the village offices were filled by persons belonging to a particular family. They had a preferential right to be appointed to those posts if they possessed the prescribed qualifications. In *Dasaratha Ram Rao's case*,<sup>3</sup> this Court held that a law which recognised the custom by which a preferential right to an office vested in the members of a particular family was violative of the fundamental right guaranteed by Article 16. The Act, in abolishing all the hereditary village offices merely gave effect to the principle established by the said decision.

Learned Counsel for the appellants has fairly conceded that the Act is within the legislative competence of the State Legislature. But he has questioned the validity of the Act on the ground that it is a piece of colourable legislation. It is stated that though the declared object of the Act is to abolish the offices which were held hereditarily, in fact what is sought to be done is to extinguish the right of the present incumbents and thereafter appoint persons to be recruited by the State Government. Relying upon the Rules made under the Act as

1 (1959) S.C.J. 967 (1959) 2 A.N.W.R. (S.C.) 2 (1961) 1 M.L.J. (S.C.) 63 (1961) 1 A.N. 156 (1959) 2 M.L.J. (S.C.) 156 1959 Supp. W.R. (S.C.) 63 (1961) 1 S.C.J. 310  
(1) S.C.R. 319 (329)

supporting his contention, learned Counsel for the appellants has argued that the posts are not being abolished but by colourable exercise of power the State Government is seeking to remove the present incumbents to enable it to appoint persons of its choice. We are unable to accede to this contention.

As pointed out by this Court in *Gajapati Narayan Deo's case*,<sup>1</sup> the whole doctrine of colourable legislation resolves itself into the question of competency of a particular Legislature to enact a particular law. If the Legislature is competent to pass the particular law, the motives which impel it to pass the law are really irrelevant. It is open to the Court to scrutinize the law to ascertain whether the Legislature by device, purports to make a law which, though in form appears to be within its sphere, in effect and substance, reaches beyond it.

Beyond attempting the argument that the impugned Act is a piece of colourable legislation, learned Counsel for the appellant has not succeeded in substantiating his contention that the Act and the Rules made thereunder are merely a device for removing the present incumbents from their office. The provisions of the Act and the Rules made thereunder plainly provide for the abolition of hereditary village offices and make those offices stipendiary posts. The Act makes no secret of its intention to abolish the hereditary posts.

It is argued that even after abolition, the same posts are sought to be continued. It is no doubt true that the names of the offices have not been changed but there is a basic structural difference between the posts that have been abolished and the posts that have been created. The posts created by the new Act are stipendiary posts. They carry salaries according to the grades created by the Rules. The incumbents are transferable and their service is pensionable. Different qualifications are prescribed for the new posts. From a consideration of the incidents attaching to the new posts it is clear that the old posts have been abolished and new posts have been created and that the whole complexion of the posts has been changed.

The result is that in our opinion the impugned Act cannot be held to be a piece of colourable legislation and as such invalid.

Now we may deal with Civil Appeal No. 190 of 1965. In the affidavit filed in support of Writ Petition No. 177 of 1963 out of which the above Civil Appeal arises it has been stated that the Madras Hereditary Village Offices Act (III of 1895) does not in terms apply to the village offices of the district of South Kanara, that its principles have been observed in common practice by the revenue authorities, and that their appointments are governed by the Standing Orders of the Madras Board of Revenue which have not been repealed by the Act. The petitioners' case is that a consideration of the Madras Board's Standing Orders would show that the post of karnam is a civil post coming within the ambit of Article 311 and that therefore the abolition of their posts in effect amounts to 'removal' within the meaning of that Article.

It is no doubt true that the Madras Village Offices Act, 1895, does not apply to South Kanara District, but the hereditary principle has been applied to village offices in the South Kanara District in accordance with the instructions contained in the Madras Revenue Board's Standing Orders and the impugned Act has abolished the principle of heredity in making appointments to the village offices. Learned Counsel for the appellant has argued, relying on the decision of the Privy Council in *Musti Venkata Jagannadha v. Musti Veerabhadrayya*<sup>2</sup>, that the karnam under the Madras Karnams Regulation is a personal appointee and that there is no absolute right of hereditary succession to that office and that the principle of heredity does not apply to that office. The correct position with regard

1. (1953) S.C.J. 592; (1954) S.C.R. 1.

2. (1921) 41 Mad. L.J. 1; L.R. 48 I.A. 244; I.L.R. 44 Mad. 643.

to karnams (shambhogs) in South Kanara District, will be evident from the following extracts

Proceedings of the Board of Revenue, Madras, dated 21st November, 1868, reads as follows

The Village Offices in Canara are not hereditary by law but good policy requires that the hereditary principle should be observed as far as the efficiency of administration permits in order that the value of the office may be enhanced as much as possible and that the services of men of good social standing whom the emoluments of the Office alone would not attract may be procured

Standing Order, dated 7th July, 1883 of the Collector, South Kanara, reads

Subordinate Revenue Offices in the District are hereby directed to bear in mind that in submitting nominations to the posts of Village Officials, the principle to be invariably followed is that the heir of the last permanent incumbent is the man entitled to the vacancy unless he is clearly unfit to hold it. In the case of a minor heir or one disqualified for active service by near relationship to a dismissed incumbent some one should be recommended to act during the minority of the heir or the lifetime of the dismissed incumbent as the case may be.

Standing Order dated 24th August, 1882, of the Collector, South Kanara, reads

(i) Succession to village offices will in future be regulated on the principle set forth in the Collector's Standing Order of 1883 namely that the heir of the last permanent incumbent is the man entitled to the post unless he is already unfit to hold it

(ii) The Collector takes the opportunity of directing that a register be opened in each Taluk in the annexed form showing the name and other description of the permanent incumbent of each post at present. One whole page should be left for each office to show the changes in the office-holders from time to time. If the register is carefully maintained it will greatly facilitate the speedy and satisfactory disposal of claims to vacant village offices which owing to want of such a Register at present are made the subject of lengthy enquiries.

It is not therefore correct to say that the principle of heredity does not apply to the appointments of shambhog in the District of South Kanara. The fact that the Board's Standing Orders have not been repealed in their application to the district of South Kanara, which is now part of the State of Mysore, will not make any difference since the Board's Standing Orders recognise the principle of heredity underlying the Madras Hereditary Village Offices Act. The Schedule to the impugned Act specifically repealed the Madras Hereditary Village Offices Act and the Madras Karnams Regulation.

The points raised by the appellants must therefore fail. The result is that the appeals are dismissed with costs, one hearing fee.

K S

*Appeals dismissed*

## THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT —A K SARKAR AND J R MUDHOLKAR, JJ

Mohamed Reza Debsani

*Appellant\**

The State of Bombay and others

*Respondents*

*Constitution of India (1950) Article 5—Iranian National registered under Foreigners Rules, 1939, residing in India for over 5 years before 21st November, 1949 under residential permits renewed from time to time under Foreigners Order, 1946—If can claim to be citizen of India under Article 5 on the basis that he had his domicile in the territory of India*

The onus of proving change of domicile is on the person claiming it. Where a foreign national was a minor when he entered India with his father his domicile will be that of his

father. Where he attained majority only in 1943 he cannot be entitled to change his domicile before that date. He has to establish the change in domicile by proving that after 1943 and before 21st November, 1949, (when Article 5 of the Constitution came into force) he had proved the intention of making India his home. In his application for passport he had described himself as an Iranian National and since 1949 in his application for residential permits and extension thereof he described himself as an Iranian National. There was, therefore, no evidence of any intention to change his domicile. An Indian citizen cannot be a national of another country. Residence alone is insufficient evidence to establish acquisition of a new domicile; there has also to be proof that the residence in a country was with the intention of making it that person's home. Of such intention there is little evidence in the case. From the mere fact of a foreigner (Iranian) taking over or becoming partner in a restaurant business in India, it is impossible to hold that he had decided to make India his home.

Appeal by Special Leave from the Judgment and Order, dated the 3rd October, 1962, of the Bombay High Court in Appeal No. 295 of 1960 from Original Decree.

*S. J. Sorabjee, G. L. Sanghi, B. R. Agarwala, and Miss M. S. Patel*, Advocates and *H. K. Puri*, Advocate for *M/s. Gagrati & Co.*, for Appellant.

*C. K. Daphtary*, Attorney-General for India (*B. R. L. Iyengar*, Advocate, and *B. R. G. K. Achar*, Advocate for *R. H. Dhebar*, Advocate, with him), for Respondents.

The Judgment of the Court was delivered by

*Sarkar, J.*—The appellant, an Iranian national by birth, came to India from Yezd in Iran with his maternal uncle, an Iranian national, in 1938 when he was about thirteen years old. The record does not show on what passport he entered India. In January, 1945, he obtained an Iranian passport and went to Iraq on pilgrimage. This passport showed that he held an identity card of the Iranian Government. On return from the pilgrimage, he was on 22nd March, 1946, registered under the Registration of Foreigners Rules, 1939, as an Iranian national. On 25th May, 1951, he obtained a residential permit under the Foreigners Order, 1938, permitting him to reside in India upto a certain date. This permission was extended from time to time at his request. On 2nd December, 1957, his last request was refused and he was ordered under the Foreigners Act, 1946, to leave India. On 14th December, 1957, he filed a suit in the City Civil Court at Bombay for a declaration that he was a citizen of India and for an injunction restraining the State of Bombay, the Police of Bombay and the Union of India from taking action against him on the footing that he was a foreigner and not a citizen of India. This suit was dismissed by the City Civil Court and an appeal by the appellant to the High Court at Bombay also failed. He has now appealed to this Court with Special Leave.

The appellant bases his claim to citizenship of India on Article 5 of the Constitution. Under that Article every person who had his domicile in the territory of India and had been ordinarily resident there for not less than five years immediately preceding the commencement of the Constitution was declared to be a citizen of India. Article 5 of the Constitution came into force on 21st November, 1949. It is not in dispute that the appellant had been ordinarily resident in the territory of India for over five years before 21st November, 1949. The only question in this appeal is whether he had his domicile in the territory of India on that date.

When the appellant arrived in India he was a minor. His domicile was, therefore, that of his father which was Iranian. This is not disputed. The appellant contends that he had changed his Iranian domicile into an Indian domicile prior to 21st November, 1949. The onus of proving the change of domicile is, of course, entirely on the appellant. Such change can be proved if it is established that the appellant had made up his mind to make India his home,



that is to say, remain in India permanently. The facts established are that since 1938 excepting for a visit to Iraq lasting about a year he has all along been a resident of Bombay. It is well established that residence alone is insufficient evidence to establish acquisition of a new domicile, there has also to be proof that the residence in a country was with the intention of making it the person's home.

Now on the question of intention of the appellant to make India his home, there is very little evidence. The evidence shows that after his arrival in India the appellant was put in a school but before he attained majority he took up the job of a cashier in a restaurant in Bombay. He attained majority sometime in 1943. Prior to that he was not entitled under the law to change his domicile. He has to establish the change in domicile by proving that after 1943 and before 21st November, 1949, he had formed the intention of making India his home. There is very little during this short period from which one can draw an inference that he had intended to change his domicile. He was then quite young. During this period he left India on an Iranian passport declaring himself to be an Iranian national. On his return he was registered as an Iranian national on 23rd March, 1946. These facts do not support the appellant. It is said that he had done all these because under the law then obtaining he had no option. It has however to be pointed out that it was open to him then, if he wished to change his nationality, to get himself naturalised as a British Indian subject under the Naturalisation Act of 1926. The only other fact which happened between 1943 and 1949 to which our attention was drawn was that in 1947 he took over a restaurant business on royalty basis for a period of three years. From this fact alone it is impossible to hold that the appellant had decided to make India his home. We do not even know whether during this period he was economically independent or had his own residential establishment.

The conduct of the appellant subsequent to 1949 does not help to establish that he had earlier formed the intention to live in India for good. As we have already stated, he obtained a residential permit and from time to time applied for its extension. In these applications he described himself as an Iranian national. It was contended that this description does not militate against his claim to an Indian domicile. It was said that a person may be a national of one country and have his domicile in another country. Here however the question of domicile arises because on the basis of it the appellant claims citizenship of India. We are not aware that it is possible to be a citizen of India and a national of another country. The decision of this Court in the *State Trading Corporation of India, Ltd v Commercial Tax Officer*<sup>1</sup> would indicate that that cannot be done. It was there said at page 1818:

<sup>1</sup> All citizens are nationals of a particular State but all nationals may not be citizens of the State."

It would follow from that that an Indian citizen cannot be a national of another State. Therefore, when the appellant described himself as an Iranian national in his applications for a residential permit and for extensions thereof after 1950, he was saying that he was not an Indian citizen. If he was not an Indian citizen, he did not have an Indian domicile, for if he had such a domicile, he would have been a citizen of India. These applications, therefore, furnish evidence that even after 1950 he was not of Indian domicile. We may also mention that after 1950 he obtained a duplicate of his registration certificate under the Foreigners' Rules as the original had been lost and in the application for it he described himself as an Iranian national. Then we find that in one of the applications for extension of residential permit he had stated that he was desirous of staying in India for business and so, not for making it his home. As late as 30th March, 1957, he described himself as an Iranian national in the application that he made,

for naturalisation as an Indian citizen which was refused. He could have all along claimed Indian citizenship on the basis of Indian domicile if he had one. Instead of making such a claim or any effort in that regard he continued proceeding on the basis that he was an Iranian national.

It appears that in 1950 he first entered into a partnership to run a restaurant of which he became the sole proprietor in March, 1953. This by itself is not enough to establish the necessary intention. In any case it cannot show that prior to November, 1949, he had acquired Indian domicile. It has to be remembered that notwithstanding the commencement of a business of his own, the appellant went on describing himself as an Iranian national indicating thereby that he had not acquired an Indian domicile though he was carrying on a business in this country. We may also point out that his father had carried on a similar business in India for thirty years and had gone back with the money earned here and settled down in his village Yezd in Iran. Then we find that the appellant had on more than one occasion asked his father to come over to India to look after his business and that he was keeping contact with his mother and sisters in Iran and had taken steps to go over to meet them. Further, he made an application to a Magistrate at Bombay for grant of a domicile certificate to him on 13th October, 1954, which was refused. It appears from a letter that the appellant wrote to the Police on 24th September, 1955, in connection with a permit for extension of stay in India which he had omitted to obtain in due time that as he had applied for the certificate of domicile he was under the impression that extensions of permits were no longer necessary for him. This would indicate that the appellant's real object of applying for domicile was to avoid the botheration of having to apply constantly for extension of the residential permit and not that he had intended to make India his home.

In this state of the evidence it cannot be held that the appellant has been able to prove his intention to settle in India or make India his home. The result is that the appeal fails and is dismissed with costs.

*Appeal dismissed.*

K.S.

### THE SUPREME COURT OF INDIA. (Civil Appellate Jurisdiction.)

PRESENT:—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO\*  
M. Hidayatullah, J. C. SHAH AND S. M. SIKRI, JJ.

Bishambhar Nath Kohli and others

.. *Appellants\**

v.

The State of Uttar Pradesh and others

.. *Respondents\**

*Administration of Evacuee Property Act (XXXI of 1950) (as amended by Act I of 1960), sections 27 and 58 (3) —Declaration by Deputy Custodian, Lucknow, as evacuee property under Ordinance XII of 1949—Acquisition of that property by Central Government under Act XLIV of 1954—Sale by auction and purchase by R. G. K. in 1957 —Revision petition in 1961 by U. P. State to Custodian-General against the order declaring the property as evacuee property in 1949—Maintainability—Exercise of revisional powers in his discretion—Jurisdiction of Supreme Court to interfere in appeal—Additional evidence of copies of evidence—Inconsistent with judicial procedure and Rules of natural justice—Displaced Persons (Compensation and Rehabilitation) Act (XLIV of 1954), section 12.*

Section 27 of the Administration of Evacuee Property Act (XXXI of 1950) authorises the Custodian-General at any time, either on his own motion or on application made to him in that behalf, to call for the record of any proceeding in which any custodian has passed an order, for the

11th October, 1965.

\*C. A. No. 659 of 1964.

purpose of satisfying himself as to the legality or propriety of such an order and to pass such order in relation thereto as he deems fit. No time limit is fixed thereunder for the exercise of his power of revision.

Whether in a particular case the Custodian General may entertain such a petition notwithstanding gross delay in instituting the proceedings is a matter within his discretion.

The Supreme Court in exercise of its appellate jurisdiction under Article 1136 of the Constitution would not be justified in interfering with the order of the Custodian General in a matter essentially within his competence and relating to the exercise of his discretion however much the Court may disagree with him.

By a chain of fictions (in Ordinances XII of 1949, XXXVII of 1949 and Act XXXI of 1950) a thing done or an action taken under Ordinance XII of 1949 is to be deemed to be done or taken under the Act XXXI of 1950.

If fictionally the order of the Deputy Custodian is to be deemed to have been passed under the 1950 Act as if that Act had been in existence on the date of the order the conclusion is inescapable that that order would be subject to the appellate or revisionary jurisdiction of the Authority empowered which power may be deemed to have been in force at the time the order was passed.

The rule enshrined in section 6 of the General Clauses Act 1897, applies only if a different intention does not appear. Section 58 (3) of the 1950 Act shows such different intention in so far as it directs that things done or action taken under the prior Ordinance shall be deemed to be done or taken under the Act as if that Act was in force on the relevant date. This is a clear departure from section 6 General Clauses Act. The use of the expression 'subject thereto' in the commencement of the positive part of section 58 (3) cannot attribute to the previous operation an overriding effect so as to deprive the authorities under the Repealing Act of their power to entertain appeals and revisions which they possess by the express enactment that the acts done or actions taken are deemed to be done under that Act.

Further the 'Explanation' incorporated in section 27 by Act 1 of 1960 that the Custodian General may exercise his powers under the section in relation to any property notwithstanding such property has been acquired under section 12 of the Displaced Persons (Compensation and Rehabilitation) Act (XLIV of 1954) indicates that it is still open to the Custodian-General to exercise his powers of revision.

The Custodian-General had therefore the power to entertain the revision petition.

But the procedure followed by him is in gross violation of the rules of natural justice. He was not justified in acting on the evidence sought to be brought on record for the first time in revision without giving an opportunity to the appellants of meeting that evidence. No party has a right to adduce additional evidence in revision and that too copies of documents. Such a procedure is inconsistent with the procedure to be followed in a judicial trial.

The order appealed from is set aside and the matter remanded to the Custodian-General for proceeding according to law.

Appeal by Special Leave from the Judgment and Order, dated the 11th September, 1962, of the Custodian General of Evacuee Property, Department of Rehabilitation, Ministry of Works, Housing and Supply, New Delhi in Revision Petition No. 1209 R/UP/1961.

*Gopal Singh*, Advocate, for Appellants

*S. T. Desai*, Senior Advocate, (*O. P. Rana*, Advocate, with him) for Respondent No. 1

*N. S. Bindra*, Senior Advocate (*K. S. Chawla* and *R. N. Sachthey*, Advocates, with him), for Respondents Nos. 2, 3 and 4

The Judgment of the Court was delivered by

*Shah, J.*—House No. 11 Kaiserbagh at Lucknow, was since 1918 in the occupation of one Chowdhry Akbar Hussain. After the partition of India, Chowdhry Akbar Hussain migrated to Pakistan. By order, dated 12th October, 1949, the Deputy Custodian of Evacuee Property, Lucknow, in exercise of power

"under section 6 of the U. P. Administration of Evacuee Property Ordinance, I of 1949, as continued to force by Central Ordinances XII and XX of 1949" declared No. 11, Kaiserbagh as 'evacuee property'. No claim was preferred by any person in pursuance of this notification, and management of the property continued with the Custodian of Evacuee Property. Under V.P. Ordinance, 1 of 1949, as continued in force by Central Ordinances and Rehabilitation Act (XLIV of 1954), the Central Government by a notification, dated 27th May, 1955, acquired the property for the Central pool constituted under that Act. On 7th June, 1957, the property was put up for sale by public auction and was purchased by one Ram Chand Kohli.

On 27th September, 1961, the State of Uttar Pradesh applied under section 27 of the Administration of Evacuee Property Act (XXXI of 1950), invoking the revisional jurisdiction of the Custodian-General against the order of the Deputy Custodian notifying the property as evacuee property. The State of Uttar Pradesh claimed that the property belonged to the State and Chowdhry Akbar Hussain had no proprietary interest in the property and accordingly the Deputy Custodian had no power to declare it "evacuee property". It was submitted that the State of Uttar Pradesh was not aware of the notification declaring the property to be evacuee property, nor of the subsequent proceedings and of the sale to Ram Chand Kohli. The appellants who are the legal representatives of Ram Chand Kohli contended, *inter alia*, that the petition was belated, and that in any event the property being of the ownership of Chowdhry Akbar Hussain it was lawfully declared evacuee property. The Custodian-General upheld the plea of the State of Uttar Pradesh, and set aside the order of the Deputy Custodian. With Special Leave the heirs and legal representatives of Ram Chand Kohli have appealed to this Court.

We propose in this appeal only to deal with the plea of the appellants that the Custodian-General had no jurisdiction to entertain the petition filed by the State of Uttar Pradesh. If the appellants fail to establish that plea, the case must be remanded to the Custodian-General for re-trial, because we are of the view that the trial of the petition is vitiated by gross irregularities and breach of the rules of natural justice.

Section 27 of the Administration of Evacuee Property Act (XXXI of 1950) authorises the Custodian-General *at any time*, either on his own motion or on application made to him in that behalf, to call for the record of any proceeding in which any Custodian has passed an order for the purpose of satisfying himself as to the legality or propriety of any such order, and to pass such order in relation thereto as he thinks fit. Section 27 does not prescribe any limit of time within which the power in revision may be exercised. The Custodian-General may call for the record of any proceedings of a subordinate officer at any time, and pass such order in relation thereto as may be called for to do justice to the parties affected by the proceeding. The powers of the Custodian-General are unquestionably judicial and normally he may not be justified in entertaining a petition in revision which has been instituted after great delay, especially when titles of persons other than those directly concerned in the order sought to be revised, have intervened. There was in this case great delay in lodging the petition by the State of Uttar Pradesh invoking the jurisdiction of the Custodian-General. Notice of the order made on 12th October, 1949, was issued and thereafter also there were several proceedings before the Custodian and the Settlement Commissioner in regard to the property. The authorities of the State appear to have betrayed gross negligence in protecting the public interest, if their case about the title of the State be true. But the Custodian-General appears to have been of the view that in exercise of jurisdiction conferred by statute the petition should be entertained and power under the Act be exercised. Whether in a given case, the Custodian-General may entertain a petition against an order passed by a subordinate authority, notwithstanding gross delay in instituting the proceeding is

a matter within his discretion. We do not think that in exercise of the appellate jurisdiction of this Court under Article 136 of the Constitution we would be justified in interfering with the order of the Custodian General in a matter which is essentially within his competence and relates to the exercise of his discretion, however much we may disagree with him.

The question which then must be considered is, whether the Custodian General had the power to entertain the petition under section 27 of the Administration of Evacuee Property Act XXXI of 1950, challenging the order passed by the Deputy Custodian on 12th October, 1949. It may at once be observed that the reference in the notification issued by the Deputy Custodian to U.P. Ordinance I of 1949 has been made on account of some inadvertence. The notification was issued after the U.P. Ordinance expired and when Central Ordinance, XII of 1949 was applied to the United Provinces by Ordinance, XX of 1949. The U.P. Ordinance, I of 1949, was promulgated by the Governor of the United Provinces on 22nd June, 1949. Shortly before the promulgation of that Ordinance the Governor General had in exercise of the powers conferred by section 42 of the Government of India Act 1935, issued Central Ordinance XII of 1949, called 'The Administration of Evacuee Property (Chief Commissioners Provinces) Ordinance 1949'. This Ordinance was applicable in the first instance to the Chief Commissioners' Provinces of Ajmer Merwara and Delhi and it would be extended to any other Province by notification issued by the Central Government. The Governor General issued on 23rd August, 1949, Ordinance XX of 1949, by section 4 whereof Ordinance XII of 1949, was applied to the Provinces of Madras and the United Provinces. By section 6 of Ordinance XII of 1949 the Deputy Custodian was authorised to notify evacuee properties which had vested in him under section 5 of the Ordinance. A person claiming any right to or interest in any property notified under section 6 could prefer a claim within 30 days or such extended time as the Deputy Custodian allowed that the property is not evacuee property or that his interest in the property is not affected by the provisions of the Ordinance. The Deputy Custodian was thereupon required to hold an inquiry in the prescribed manner, and after taking such evidence as may be produced to pass an appropriate order. An order passed by a Deputy Custodian on inquiry in the prescribed manner was appealable to the Custodian at the instance of a party aggrieved thereby section 30 (1). The Custodian had also the power to call for the record of any proceeding which was pending or had been disposed of, by an officer subordinate to him, for the purpose of satisfying himself as to the legality or propriety of the order passed therein, and to pass such order in relation thereto as he deemed fit. By subsection (6) of section 30, subject to the provisions of sub sections (1) to (5) of section 30, any order passed by the Custodian, Deputy Custodian, Additional Custodian, Assistant Custodian or Authorised Deputy Custodian was declared final and not liable to be called in question in any Court by way of appeal or revision or in any original suit, application or execution proceeding.

On October 18, 1949, the Governor General issued Ordinance XXVII of 1949 called 'The Administration of Evacuee Property Ordinance, 1949'. Under that Ordinance the Custodian could under section 7, after notice to the persons interested and after holding such inquiry into the matter as the circumstances of the case permitted pass an order declaring any property to be evacuee property, and on such declaration the property vested in the Custodian. By section 24 any person aggrieved by an order made amongst other sections under section 7, could prefer an appeal to the authority specified in the section. Section 27 invested the Custodian General with power at any time to call for the record of any proceeding in which any Custodian had passed an order in appeal under the provisions of Chapter V for the purpose of satisfying himself as to the legality or propriety of any such order and to pass such order in relation thereto as he thought fit and every order made by the Custodian General, Custodian, Additional Custodian or Assistant

Custodian was by section 28 declared final and not liable to be called in question in any Court by way of appeal or revision or in any original suit, application or execution proceeding. By sub-section (1) of section 55 Ordinance XII of 1949 was repealed, and by sub-section (3) it was provided that notwithstanding the repeal of Ordinance XII of 1949 or of any corresponding law, anything done or any action taken in the exercise of any power conferred by that Ordinance or law shall be deemed to have been done or taken in the exercise of the powers conferred by Ordinance XXVII of 1949, and any penalty incurred or proceeding commenced under that Ordinance or law shall be deemed to be a penalty incurred or proceeding commenced under Ordinance XXVII of 1949 as if Ordinance XXVII of 1949 were in force on the day on which such thing was done, action taken, penalty incurred or proceeding commenced. This Ordinance XXVII of 1949 was repealed by the Administration of Evacuee Property Act (XXXI of 1950). The scheme of this Act was identical with the scheme of the Administration of Evacuee Property Ordinance XXVII of 1949. Section 7 conferred power upon the Custodian to notify any property, after holding an inquiry, to be evacuee property. Any person aggrieved by an order under section 7, could under section 24 prefer an appeal to the specified authority. By section XXVII revisional jurisdiction was conferred upon the Custodian-General in terms similar to section 27 of Ordinance XXVII of 1949, and by section 28 every order made by the Custodian-General, Custodian, Additional Custodian, Authorised Deputy Custodian, Deputy Custodian or Assistant Custodian was, save as otherwise expressly provided in Chapter V, declared final and not liable to be called in question in any Court by way of appeal or revision or in any original suit, application or execution proceeding. By sub-section (1) of section 58, the Administration of Evacuee Property Ordinance, XXVII of 1949, was repealed. Sub-section (3) of section 58 read as follows:

"The repeal by this Act of the Administration of Evacuee Property Ordinance, 1949 or the Hyderabad Administration of Evacuee Property Regulation or of any corresponding law shall not affect the previous operation of that Ordinance Regulation or corresponding law, and subject thereto, anything done or any action taken in the exercise of any power conferred by or under that Ordinance, Regulation or corresponding law, shall be deemed to have been done or taken in the exercise of the powers conferred by or under this Act as if this Act were in force on the day on which such thing was done or action was taken."

By Ordinance XXVII of 1949 a proceeding commenced under Ordinance XII of 1949 or anything done or action taken in the exercise of the powers conferred under that Ordinance was to be deemed a proceeding commenced, thing done and action taken under the former Ordinance as if that Ordinance were in force on the date on which the proceeding was commenced, thing was done or action was taken. Section 58 (3) of Act XXXI of 1950 contained a similar deeming provision that anything done or action taken in exercise of the power conferred under Ordinance XXVII of 1949 is to be deemed to have been done or taken in exercise of the power conferred by or under Act XXXI of 1950, as if the Act were in force on the day on which such thing was done or action was taken.

By this chain of fictions, things done and actions taken under Ordinance XII of 1949 are to be deemed to have been done or taken in exercise of the powers conferred under Act XXXI of 1950, as if that Act were in force on the day on which such thing was done or action taken. The order passed by the Deputy Custodian under section 6 of Ordinance XII of 1949 was, therefore, for the purpose of this proceeding, to be deemed an order made in exercise of the power conferred by Act XXXI of 1950 as if that Act were in force on the day on which the order was passed.

But it was urged by Counsel for the appellants that this chain of fictions did not assist the State of Uttar Pradesh because by each of the successive statutes the operation of the fiction was subject to the finality of the orders made under the earlier Ordinance. It was claimed that the repeal of Ordinance XII of 1949 by Ordinance XXVII of 1949 did not affect the previous operation of the repealed

Ordinance, including the finality of orders made under that Ordinance and by section 55 (3) of Ordinance XXVII of 1949 the finality of the order of the Deputy Custodian under sub section (6) of section 30 of Ordinance XII of 1949 was preserved. Similarly under Act XXXI of 1950 things done or actions taken under Ordinance XXVII of 1949 were to be deemed to have been done or taken under the Act but thereby finality of orders declared by section 28 of the Ordinance was not trenching upon. It was submitted, that by section 58 (3) in a technical sense things done and actions taken or deemed to be done or taken under Ordinance XXVII of 1949 were to be deemed to have been done or taken under Act XXXI of 1950 but finality of the orders declared by section 30 (6) of Ordinance XII of 1949 was not affected, and the orders of the Deputy Custodian could not be set aside by the Custodian General in exercise of the power under section 27 of Act XXXI of 1950. In support of this contention reliance was placed upon certain *dicta* in two decisions of this Court *Indira Sohanlal v Custodian of Evacuee Property, Delhi and others*<sup>1</sup> and *Dafedar Niranjana Singh and another v Custodian Evacuee Property (Punjab) and another*<sup>2</sup>. In our view no support is to be derived from those cases for the claim made by Counsel for the appellants. In *Indira Sohanlal's case*<sup>1</sup> an application to sanction an exchange made under section 5 A of the East Punjab Evacuees' (Administration of Property) Act, 1947 as amended in 1948 was decided on 30th March 1952 by the Additional Custodian after Act XXXI of 1950 was brought into force. Exercising power under section 27 of Act XXXI of 1950 the Custodian General set aside the order of confirmation and remanded the case to be reconsidered by the Custodian. In appeal to this Court against that order, it was submitted that the order of the Additional Custodian was not open to revision by the Custodian General because the appellant had a vested right to have the application for confirmation determined under section 5 A of the East Punjab Evacuees' (Administration of Property) Act, and finality under section 5 B attached to such determination repeal and re-enactment of those provisions notwithstanding. This Court held that the application for confirmation of exchange was pending on the date on which Act XXXI of 1950 came into force and had to be dealt with and disposed of under that Act; the order of confirmation passed in 1952 was therefore subject to the revisional jurisdiction of the Custodian General under section 27 of the Act. That decision can have no application to this case. But Counsel relied upon certain observations made by Jagadadhas J at page 1136.

Without attempting to be meticulously accurate it may be stated in general terms that the scheme underlying section 58 (3) appears to be that every matter to which the new Act applies has to be treated as arising and to be dealt with under the new law except in so far as certain consequences have already ensued or acts have been completed prior thereto to which it is the old law that will apply.

These observations, in our judgment lend no support to the contention that the finality declared under section 30 of the Ordinance I of 1949, in respect of the orders passed or proceedings taken remains attached to the order of the Deputy Custodian so as to prevent the Custodian General from exercising his power under section 27 of Act XXXI of 1950.

In *Dafedar Niranjana Singh's case*,<sup>2</sup> the Custodian of Evacuee Property Patiala, had taken possession of two houses acting under the Patiala Evacuee (Administration of Property) Ordinance of Samvat 2004. On a claim made by the appellant that the houses belonged to him the Custodian by his order, dated 6th June, 1949 released the houses. Thereafter several Ordinances relating to evacuee property were passed one after another, the succeeding Ordinance repealing the previous one and creating except in the case of repeal of Ordinance IX of Samvat 2004 a chain of fictions by which certain provisions of the repealed Ordinance were deemed to continue under the repealing Ordinance. The last

Ordinance was replaced by the Administration of Evacuee Property Act (XXXI of 1950). The Custodian-General exercising powers under section 27 of that Act set aside the order of the Custodian which released the property in favour of the appellant. In appeal against the order of the Custodian-General, it was held that the order, dated 6th June, 1949, passed by the Custodian under Ordinance IX of Samvat 2004 could not be deemed to be an order passed under Act (XXXI of 1950) as the chain of fictions was broken, when Ordinance XIII of Samvat 2006 repealing the previous Ordinance IX of Samvat 2004 was issued, and there was no scope for the exercise of his power by the Custodian-General under section 27 of Act (XXXI of 1950). The Court then proceeded to interpret section 58 (3) of Act (XXXI of 1951), on the assumption that the order of the Custodian, dated 6th June, 1949, by a chain of fictions was to be deemed an order made by the Custodian in exercise of the powers conferred on him by Act (XXXI of 1950), and observed:

"Sub-section (3) of section 58... is in two parts. The first part says that the repeal by the Act of the said Ordinance shall not affect the previous operation of the said Ordinance and the second part says that anything done or any action taken in the exercise of any power conferred by or under that Ordinance shall be deemed to have been done or taken in the exercise of the powers conferred by or under this Act as if this Act were in force on the day on which such thing was done or action taken. The second part is expressly made subject to the first part. If a case falls under the first part, the second part does not apply to it. In the present case under the previous operation of the Ordinance the order of the Custodian had become final. If so, the fiction introduced in the second part could only operate on that order subject to the finality it had acquired under that Ordinance."

In our view, the decision of the Court on the principal ground that the chain of fictions was broken, and the impugned order was not one which was to be deemed to have been made under Act (XXXI of 1950), rendered consideration of all other questions unnecessary. If by the observations set out, it was intended to lay down that the legal fiction introduced by section 58 (3) of Act (XXXI of 1950), by which anything done or action taken in exercise of the powers conferred by the earlier Ordinance was to be deemed to have been done or taken in exercise of the powers by or under the Act applies only if under the earlier Ordinance anything done or action taken had not become final by virtue of the provisions of that Ordinance, we are unable, with respect, to accept that interpretation. By the first part of section 58 (3) repeal of the statutes mentioned therein did not operate to vacate things done or actions taken under those statutes. This provision appears to have been enacted with a view to avoid the possible application of the rule of interpretation that where a statute expires or is repealed, in the absence of a provision to the contrary, it is regarded as having never existed except as to matters and transactions past and closed: see *Surtees v. Ellison*.<sup>1</sup> This rule was altered by an omnibus provision in the General Clauses Act, 1897, relating to the effect of repeal of statutes by any Central Act or Regulation. By section 6 of the General Clauses Act, it is provided, insofar as it is material, that if any Central Act or Regulation made after the commencement of the General Clauses Act repeals any enactment, the repeal shall not affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder, or affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed, or affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, any such penalty, forfeiture or punishment may be imposed, as if the repealing Act or Regulation had not been passed. But the rule contained in section 6 applies only if a different intention does not appear, and by enacting section 58 (3) the Parliament has expressed a different intention, for whereas the General Clauses Act keeps alive the previous operation of the enactment repealed, and things done and duly suffered, the rights, privileges, obligations or liabilities.



acquired or incurred, and authorises the investigation, legal proceeding and remedies in respect of rights, privileges, obligations, liabilities penalties forfeiture and punishment, as if the repealing Act or Regulation had not been passed, section 58 (3) of Act (XXXI of 1950), directs that things done or actions taken in exercise of the power conferred by the repealed statutes shall be deemed to be done or taken under the repealing Act as if that latter Act were in force on the day on which such thing was done, or action was taken. The rule so enunciated makes a clear departure from the rule enunciated in section 6 of the General Clauses Act 1897. By the first part of section 58 (3) which is in terms negative the previous operation of the repealed statutes survives the repeal. Thereby matters and transactions past and closed remain operative so does the previous operation of the repealed statute. But as pointed out by this Court in *Indira Sahasralal s case*<sup>1</sup> at page 1133, the saving of the previous operation of the repealed law is not to be read as saving the future operation of the previous law. The previous law stands repealed, and it has not for the future the partial operation as is prescribed by section 6 of the General Clauses Act. All things done and actions taken under the repealed statute are deemed to be done or taken in exercise of the powers conferred by or under the repealing Act as if that Act were in force on the day on which that thing was done or action was taken. It was clearly the intention of the Parliament that matters and transactions past and closed were not to be deemed vacated by the repeal of the statute under which they were done. The previous operation of the statute repealed was also affirmed expressly, but things done or actions taken under the repealed statute are to be deemed by fiction to have been done or taken under the repealing Act. The use of the expression 'subject thereto' in the commencement of the positive part of section 58 (3) cannot attribute to the previous operation of the repealed statute an overriding effect so as to deprive the authorities constituted under the repealing Act of their power to entertain appeals or revision applications, which they possess by the express enactment that the acts done or actions taken are deemed to have been done under the statute. To attribute to the positive part of section 58 (3) the meaning contended for by the appellants would result in denying to the repealing statute the full effect of the fiction introduced by the Parliament that is, acts done or actions taken since the repealing Act would be subject to the appellate jurisdiction of the authority having power under the Act but not the acts deemed to be done or actions deemed to be taken. There is no warrant for attributing to the fiction this qualified operation. The Legislature has not expressed such a reservation in the application of the fiction, and none can be implied. The order made by the Deputy Custodian was declared final by sub-section (6) of section 30 of Ordinance XII of 1949, but the finality was subject to the provisions of sub-sections (1) to (5) of section 30. If fictionally the order is to be deemed to have been passed under Act (XXXI of 1950), as if the Act were in operation on 12th October, 1949, it is difficult to escape the conclusion that the order would be subject to the appellate and revisional jurisdiction of the authorities who have the appellate or revisional power by virtue of the provisions conferring those powers and which must also be deemed to have been in force at the date when the impugned order was passed.

In the present case, it is said on behalf of the State of Uttar Pradesh, that they were not aware of any proceeding taken with regard to No. 11, Kaiserbagh by the Deputy Custodian of Evacuee Property and therefore they could raise no objection. The order notifying the property was made under the Central Ordinance XII of 1949. If the notification be deemed an order within the meaning of section 30 (6), the order having been declared fictionally made under Act (XXXI of 1950), remained subject to the revisional jurisdiction of the Custodian. If any other view is taken, some startling results may follow for instance, if under an

order passed by the Custodian or action taken by him, the rights of a person are infringed, and before he files an appeal or the revising authority is moved, the Ordinance, or the Act is repealed and is substituted by a new Act or Ordinance, the person aggrieved would, if the view contended for by the appellants were to prevail, have no remedy at all, because the finality of orders declared by the repealed statute would operate. It may be noted that under section 27 of Act (XXXI of 1950) which invests the Custodian-General with powers of revision, an *Explanation* is incorporated by Act I of 1960 that the power conferred on the Custodian-General under section 27 may be exercised by him in relation to any property, notwithstanding that such property has been acquired under section 12 of the Displaced Persons (Compensation and Rehabilitation) Act, 1954. This also indicates that even if the evacuee property has been acquired under section 12 of Act (XLIV of 1954), it is still open to the Custodian-General in appropriate cases to exercise his power in revision. We are therefore of the view that the Custodian-General had the power to entertain the revision application filed by the State of Uttar Pradesh.

On the merits of the order, not much need be said. The procedure followed by the Custodian-General is, in gross violation of the rules of natural justice. As we have already observed, acting under the powers conferred upon him by section 6 of Ordinance, XII of 1949, the Deputy Custodian had notified No. 11, Kaiserbagh, as evacuee property. What the evidence before the Deputy Custodian in that behalf was, has not been disclosed. Nearly twelve years after that order was passed, the State of Uttar Pradesh moved the Custodian-General in revision. The petition invoking the revisional jurisdiction was competent, but the Custodian-General was not justified in acting upon evidence which was sought to be brought on the record for the first time before him without affording to the persons affected thereby an opportunity of meeting that evidence. It appears that in the petition filed by the State of Uttar Pradesh many new facts which were not on the record were set out. The Custodian-General has in appropriate cases the power to admit additional evidence and to consider the same: Rule 31 (9) of the Administration of Evacuee Property Central Rules, 1950. But no party has a right to tender additional evidence in appeal or before a revising authority; it is for the revising authority to decide whether having regard to all the circumstances and in the interest of justice, additional evidence tendered by a party should be admitted. It is unfortunate that the Custodian-General did not record a formal order admitting additional evidence tendered by the State of Uttar Pradesh with its petition. But we would not be justified in the circumstances of this case in assuming that the Custodian-General was oblivious of the nature and extent of his powers and restrictions thereon.

The procedure followed by the Custodian-General is however open to grave objection, because he did not even give an opportunity to the legal representatives of Ram Chand Kohli to lead evidence in rejoinder to the evidence relied upon by the State. It appears that only copies of documents on which the title of the State of Uttar Pradesh was founded were filed in the proceeding before the Custodian-General. The revision petition was heard by the Custodian-General on 4th August, 1962, and thereafter the proceeding stood adjourned till 14th August, 1962, for further hearing. On 6th August, 1962, Counsel for the appellants served a notice upon Counsel for the State of Uttar Pradesh calling upon him to give inspection of the documents referred to in the notice. No inspection was given, and the hearing took place on 14th August, 1962. It is true that Counsel for the appellants did attempt to meet the case sought to be raised by the State of Uttar Pradesh on the merits, and submitted that the property in dispute was owned by Chowdhry Akbar Hussian. That, however, would not justify the procedure followed by the Custodian-General, nor would it lead to the inference that the appellants had, in the circum-

stances of this case, waived the irregularity in the trial. It is common ground before us that at no stage, originals of a large number of documents, on which reliance was placed by the State of Uttar Pradesh, and on which the Custodian-General founded his conclusion, were produced before the Custodian-General. The Custodian-General does not appear to have even told the appellants that he had admitted copies of those documents on the record. Nor did he give to the appellants an opportunity to meet the case which the State of Uttar Pradesh sought to make out. In our view the proceedings of the Custodian-General were so wholly inconsistent with the procedure which may be followed in a judicial trial, that his order must be set aside and the proceedings remanded to the Custodian-General with a direction that he do call upon the State of Uttar Pradesh to formally tender in evidence such of the documents on which they rely, and that he do give an opportunity to the appellants in this appeal to tender such evidence as they desire to tender in support of their case. Thereafter the Custodian-General shall hear both the parties on the evidence properly brought on the record.

The appeal is allowed and the case is remanded to the Custodian-General for disposal according to law. The appellants will be entitled to their costs in this Court.

K G S.

*Appeal allowed, case remanded*

## THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT:—K SUBBA RAO, J. R. MUDHOLKAR AND R. S. BACHAWAT, JJ.  
Venkatesh Narahar KATTI

*Appellant\**

v

Hajisaheb Khadirsahab Mulia and another

*Respondents*

*Bombay Tenancy and Agricultural Lands Act (LVII of 1948), sections 14 (1) and 29 (2)—Default in payment of rent—Notice of termination of tenancy—Application for an order for possession—Starting point of limitation of two years*

The first two Tribunals under the Bombay Act (LVII of 1948) found that the first respondent defaulted in payment of rent for the years 1951-52, 1953-54 and 1954-55, the last of the defaults was on 20th May 1955 and the tenancy was properly terminated by notice terminating the tenancy, dated 8th December, 1956, it was also held that the application under section 29 (2) read with section 14 (1) (b) made on 24th June, 1957, was within time. The Revenue Appellate Tribunal, while agreeing with findings of fact, held the application was barred as having been made beyond two years of default in payment of rent.

The appellant filed a petition in the Mysore High Court under Article 227 of the Constitution which was summarily dismissed. On appeal by Special Leave.

*Held*, before the tenancy can be terminated under section 14 (1) two conditions must be satisfied (i) the tenant must be guilty of one of the breaches mentioned in section 14 (1) (a) and (ii) the landlord must give three months' notice under section 14 (1) (b) and within that period the tenant must have failed to remedy the breach.

It is on the termination of the tenancy and not earlier that 'the right to obtain possession is deemed to accrue to him' (landlord) under section 29 (2). Limitation begins to run from the date of termination of tenancy and not from the date of default in payment of rent.

The application filed on 24th June, 1957, in this case is, therefore, not barred as being within two years from 8th December, 1956 the date of the notice terminating the tenancy.

*Quære* : Whether the period of three months (under section 14 (1) (b) ) could be deducted in computing the period of limitation?

Appeal by Special Leave from the Judgment and Order, dated the 19th January, 1961, of the Mysore High Court in Civil Petition No. 654 of 1960.

*S. G. Patwardhan*, Senior Advocate, (*K. R. Chaudhury*, Advocate, with him), for Appellant.

*A. G. Ratnaparkhi*, Advocate, for Respondent No. 1.

The Judgment of the Court was delivered by

*Bachawat, J.*—The appellant is the landlord and respondent No. 1 is the tenant of S. Nos. 180 and 182 of village Dhanyal, taluk Bijapur. Respondent No. 1 defaulted in payment of rent for the years 1951-52, 1953-54 and 1954-55. On 8th December, 1956, the appellant served on respondent No. 1 three months' notice in writing under section 14 (1) (b) of the Bombay Tenancy and Agricultural Lands Act, 1948 (Bombay Act LVII of 1948) hereinafter referred to as the Tenancy Act, terminating the tenancy on the ground of default in payment of rent. On 24th June, 1957, the appellant filed an application under section 29 (2) read with section 14 (1) of the Tenancy Act for possession of the land. The Tahsildar, Bijapur, allowed the application, and directed possession of the land to be delivered to the appellant. This order was affirmed on appeal by the Assistant Commissioner, Bijapur. On revision, the Mysore Revenue Appellate Tribunal set aside the order of the first two Tribunals and dismissed the application. A petition by the appellant under Article 227 of the Constitution was summarily rejected by the Mysore High Court. The appellant now appeals to this Court by Special Leave.

The Tribunal below concurrently found that respondent No. 1 defaulted in payment of the rent for the years 1951-52, 1953-54 and 1954-55, the last default took place on May 20, 1955 and the tenancy was properly terminated by the appellant. The first two Tribunals also held that the application was filed within the time allowed by law. The Revenue Appellate Tribunal, however, held that the application being filed more than two years after 20th May, 1955, is barred by limitation. The sole question before us is whether the application was filed within the two years' period of limitation prescribed by section 29 (2) of the Tenancy Act. The appellant contends that application was filed within the prescribed period of limitation because (1) the right of the appellant to obtain possession of the land is deemed to have accrued to him on the termination of the tenancy by the notice given on 8th December, 1956, (2) in any event, in computing the two years period of limitation, the period of the three months' notice should be excluded in view of section 15 (2) read with section 29 (2) of the Indian Limitation Act, 1908. We are of the opinion that the first contention of the appellant should be accepted. In view of this conclusion, we do not think it necessary to express any opinion on the second contention advanced on behalf of the appellant.

Sections 14 (1) and 29 (2) of the Tenancy Act, as they stood at the relevant time, are as follows:

"14. (1) Notwithstanding any law, agreement or usage, or the decree or order of a Court, the tenancy of any land shall not be terminated—

(a) unless the tenant—

- (i) has failed to pay the rent for any revenue years before the 31st day of March thereof;
- (ii) has done any act which is destructive or permanently injurious to the land ;
- (iii) has sub-divided, sub-let or assigned the land in contravention of section 27 ;
- (iv) has failed to cultivate it personally ; or
- (v) has used such land for a purpose other than agriculture or allied pursuits ; and

(b) unless the landlord has given three months notice in writing informing the tenant of his decision to terminate the tenancy and the ground for such termination, and within that period the tenant has failed to remedy the breach for which the tenancy is liable to be terminated,

29 (2) No landlord shall obtain possession of any land or dwelling house held by a tenant except under an order of the Mamlatdar. For obtaining such order he shall make an application in the prescribed form and within a period of two years from the date on which the right to obtain possession of the land or dwelling house as the case may be is deemed to have accrued to him.

At first sight it may appear that the Act gives no indication of the time when the right to obtain possession of the land or dwelling house is deemed to have accrued to the landlord as contemplated by section 29 (2). But on a close scrutiny of the Act we are satisfied that this right must be deemed to have accrued to him on the date of the termination of the tenancy.

It is to be noticed that limitation for the application under section 29 (2) commences to run from the date when the right to obtain possession of the land or dwelling house is deemed to have accrued to the landlord. Now, the Legislature could not have intended that limitation would commence to run before the right to apply accrues. It is reasonable to think that the right to apply also accrues to the landlord on the date when limitation for the application begins to run. But the right to apply under section 29 (2) read with section 14 (1) accrues to the landlord when the tenancy is terminated by the notice under section 14 (1) (b). In *Raja Ram Mahadev Paranjyape v. Aba Maruti Mali*<sup>1</sup>, this Court observed

The statute has not provided for the termination of the tenancy would by necessary implication create a right in the landlord to recover possession. The statute recognises this right by providing by section 29 (2) for its enforcement by an application to the Mamlatdar.

It would follow that limitation for the application under section 29 (2) read with section 14 (1) begins to run from the date when the tenancy is terminated by the notice under section 14 (1) (b). Consequently the date of the termination of the tenancy is also the date when the right to obtain possession is deemed to have accrued to the landlord. But it is argued that on the date of the termination of the tenancy, the right to obtain possession of the land actually accrues to the landlord, and, therefore, the Legislature could not have intended that on that date this right is deemed to accrue to him. This argument must be rejected.

In spite of the termination of the tenancy, the landlord has no right to obtain possession of the land without an order of the Mamlatdar under section 29 (2). Between the date of the termination of the tenancy and the date of the order for possession under section 29 (2), the tenant continues to be in lawful possession of the land and is liable to pay rent and not mesne profits, see *Ramchandra Anant v. Janardan*<sup>2</sup>. Thus on the termination of the tenancy, the right to obtain possession of the land, though in reality not accrued to the landlord, is, by a legal fiction, deemed to have accrued to him so that he may immediately apply under section 29 (2) for an order for possession.

This conclusion is reinforced if we look at the history of the legislation. The Tenancy Act, as originally passed in 1948 did not provide for a special period of limitation for the application to the Mamlatdar under section 29. But it was thought that section 72 of the Tenancy Act attracted the period of limitation prescribed by sub sections (3) and (4) of section 5 of the Mamlatdars' Courts Act, 1906 (Bombay Act II of 1906) which are as follows:

5 (3) No suit shall be entertained by a Mamlatdar's Court unless it is brought within six months from the date on which the cause of action arose.

5 (4) The cause of action shall be deemed to have arisen on the date on which the impediment to the natural flow of surface water or the dispossession, deprivation or determination, of tenancy or other right occurred or on which the impediment, disturbance or obstruction or the attempted impediment or disturbance or obstruction first commenced.

The Bombay Revenue Tribunal therefore ruled that an application under section 29 (2) must be made within six months from the date when the cause of action accrues, see *A. S. Desai's Bombay Tenancy and Agricultural Lands Act*, Second Edn. pp. 137-38, 287-88, and in view of section 5 (4) of the Mamlatdars'

Courts Act, 1906, this cause of action was deemed to accrue on the determination of the tenancy. The six months' period of limitation led to hardship, and the Legislature decided to extend the period of limitation and enacted the Bombay Tenancy and Agricultural Lands (Third Amendment) Act, 1951 (Bombay Act XLV of 1951), which amended section 29 by providing for two years' period of limitation and also section 72 by inserting the words "save as provided in section 29". Thus, the amending Act extended the period of limitation from six months to two years, 'but both before and after the amending Act, the date of the termination of the tenancy is the starting point of limitation; formerly because the right to apply was then deemed to accrue to the landlord and now because the right to obtain possession is then deemed to have accrued to him.

The Tenancy Act was amended from time to time. The requirement of a notice for terminating the tenancy under section 14 (1) was introduced by Bombay Act (XXXIII of 1952), and is repeated in the new section 14 substituted for the original section by Bombay Act (XIII of 1956). Before the tenancy can be terminated under the new section 14 (1) two conditions must be fulfilled. Firstly, the tenant must be guilty of one of the breaches mentioned in section 14 (1) (a). Secondly, the landlord must give three months' notice in writing under section 14 (1) (b) and within that period the tenant must have failed to remedy the breach. The tenancy is not terminated unless both these conditions are fulfilled. Neither failure to pay rent nor sub-letting nor any other breach is sufficient. The breach must be followed by the requisite notice terminating the tenancy. It is on the termination of the tenancy and not earlier that the right to obtain possession of the land is deemed to accrue to the landlord and limitation for the application under section 29 (2) read with section 14 (1) begins to run.

In *Chimanbai Rama v. Ganpat Jagamath*<sup>1</sup>, a Full Bench of the Bombay High Court held that the period of limitation under section 29 (2) for applying to the Mamlatdar for possession of the land on the ground that the tenant had sub-let<sup>2</sup> it, began from the date of sub-letting, and that though the right to obtain possession actually accrues to the landlord on the date when he terminates the tenancy, under section 29 (2) it is fictionally deemed to accrue as from an antecedent point of time, viz., the date of the sub-letting. With respect, we are unable to agree with this judgment. On the termination of the tenancy by the notice under section 14 (1) (b) and before the order for possession under section 29 (2), the landlord has no right to obtain possession of the land; nevertheless this right is then deemed to accrue to him, so that he may apply immediately for an order for possession under section 29 (2). The sub-letting alone does not give him this right to apply under section 29 (2). He may, if he likes, ignore the breach. But where the breach is followed by a notice terminating the tenancy he acquires the right to apply under section 29 (2). It is difficult to impute to the Legislature the intention that limitation would begin to run against the landlord immediately on the sub-letting, though he is not aware of the breach and takes no steps for terminating the tenancy in consequence of the breach. In our opinion, limitation for the application under section 29 (2) begins to run from the date of the termination of the tenancy and not from the date of the sub-letting or the date of default in payment of rent.

In the instant case, three months' notice in writing under section 14 (1) (b) terminating the tenancy was given on 8th December, 1956. The application under section 29 (2) read with section 14 (1) being filed on 24th June, 1957, within two years of the termination of the tenancy is not barred by limitation.

In the result, the appeal is allowed with costs, the order of the Mysore Revenue Appellate Tribunal, Belgaum Branch, dated 27th July, 1960, is set aside

1. (1958) 60 Bom. L. R. 975; I.L.R. (1958) Bom. 917; A.I.R. 1959 Bom. 425.

and the orders passed by the Tahsildar, Bijapur and the Assistant Commissioner, Bijapur are restored

K G S

*Appeal allowed,  
Revenue Appellate Tribunal's order set aside*

## THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT —P B GAJENDRAGADKAR, *Chief Justice*, K N WANCHOO,  
M HIDAYATULLAH AND V RAMASWAMI, JJ

Yenumula Malludora

*Appellant\**

*v*  
Peruri Seetharatnam and others

*Respondents*

*Provincial Insolvency Act (V of 1920) sections 6, 7 and 25—Debtor's property sold in execution of money decree—Sale set aside under Order 21, rule 89 Civil Procedure Code—Act of insolvency if wiped out—If sufficient cause for refusal to adjudicate under section 25*

The jurisdiction of the Court commences when an act of insolvency takes place and that act gives a right to his creditors to apply to the Court for his adjudication under section 7 within 3 months of that act of insolvency. Sale of a person's property in execution of a decree for payment of money is an act of insolvency under section 6. Once such an act is committed it cannot be explained or purged by subsequent events. The insolvent cannot claim to wipe off by paying some of his creditors. The act of insolvency thus remained and was not purged by payment of decretal amount after the sale in execution of the money decree.

Section 25 expressly mentions three circumstances in which the creditor's petition may be dismissed; in addition the Court has been given a discretion to dismiss the petition if it is satisfied that there is other sufficient cause for not making the order against the debtor. This last clause of the section need not necessarily be read *ejusdem generis* with the previous ones but even so there can be no sufficient cause if after an act of insolvency is established the debtor is unable to pay his debts. The discretion to dismiss the petition can only be exercised under very different circumstances than that alleged (setting aside the sale which was the act of insolvency).

In the instant case there is no proof of malicious or inequitable dealing on the part of the petitioning creditors (respondent herein). They have proved the necessary facts both the act of insolvency and the inability of the appellant to pay his debts. In fact the appellant has admitted his inability to pay his debts.

Appeal by Special Leave from the Judgment and Order dated the 14th March, 1963 of the Andhra Pradesh High Court in C.R.P. No. 1725 of 1959.

M C Setalvad, Senior Advocate (T V R Tatachari, Advocate, with him) for Appellant

Kurpa Narain, Senior Advocate, (T Satyanarayana, Advocate, with him), for Respondents No. 1 and 9

The Judgment of the Court was delivered by

Hidayatullah, J.—On the application of two creditors the appellant Yenumula Mallu Dora has been adjudged insolvent by the Subordinate Judge, Kakinada and a receiving order has been passed against him. The respondents before us are one of the petitioning creditors and the legal representatives of the other petitioning creditor who died during these proceedings. The first petitioning creditor held a decree for money which he had obtained in O.S. No. 67 of 1949. He also held another money decree in O.S. No. 473 of 1948. The second petitioning creditor held a decree which she had obtained in O.S. No. 17 of 1955. The application was based upon three acts of insolvency which the appellant was stated to have committed and on the general facts that he was indebted to the tune

\*C.A. No. 474 of 1964

II]

of Rs. 2,00,000 and was unable to pay his debts. The three acts of insolvency alleged against him were (a) evasion of arrest in execution of the money decree in O.S. No. 67 of 1949; (b) sale of some of his properties on 26th September, 1956, in execution arising from O.S. No. 73 of 1952; and (c) sale of some of his properties on 19th September, 1956, in execution of money decree in O.S. No. 9 of 1950. It was also alleged that he was fraudulently transferring properties in the name of his wife and brother-in-law and had suffered a collusive charge decree for maintenance in favour of his wife, to delay and defeat his creditors.

The Subordinate Judge, Kakinada, did not accept the first two acts of insolvency. The evidence regarding evasion of arrest was not found convincing and the second act of insolvency was rejected because the sale of the property was in execution of a mortgage decree. In respect of the third act of insolvency the Subordinate Judge held that it satisfied section 6 (e) of the Provincial Insolvency Act and an adjudication and a receiving order were justified in the case. An appeal was taken to the District Court at Rajahmundry (C.A. No. 41 of 1958) which was dismissed on October 15, 1959. A revision application filed under section 75 of the Provincial Insolvency Act was dismissed by the High Court of Andhra Pradesh on 14th March, 1963. The appellant, however, obtained Special Leave of this Court and has filed the present appeal against the order of the High Court.

The contention of the appellant was, and still is, that the third act of insolvency was not established as he had deposited, within one month of the sale, the entire decretal amount together with poundage and commission and the sale was set aside on his petition under Order 21, rule 89 of the Code of Civil Procedure. He contended therefore, that as none of the acts of insolvency remained, the petition ought to have been dismissed as incompetent or he was entitled to have the petition dismissed, in any event, under section 25 of the Provincial Insolvency Act which allows a creditor's petition to be dismissed on sufficient cause. He submitted that as the sale was set aside before the order of adjudication was made there existed sufficient cause for the dismissal of the creditor's petition. The Subordinate Judge relying upon *Venkatakrisnayya v. Malakondayya*<sup>1</sup> and on decisions of the Lahore and the Calcutta High Courts rejected the submission and made the order against the appellant. The District Judge, Rajahmundry, agreed with the conclusion of the Subordinate Judge, and the High Court rejected the petition for revision. In this appeal the same points are urged again for our acceptance. In our judgment the view of the law taken in this case by the Subordinate Judge and approved by the District Court is right and does not warrant any interference.

The object of the law of insolvency is to seize the property of an insolvent before he can squander it and to distribute it amongst his creditors. It is, however, not every debtor, who has borrowed beyond his assets or even one whose property is attached in execution of his debts, who can be subjected to such control. The jurisdiction of the Court commences when certain acts take place which are known as acts of insolvency and which give a right to his creditors to apply to the Court for his adjudication as an insolvent. The Provincial Insolvency Act lays down in section 6 what acts are to be regarded as acts of insolvency. It is a long list. Some are voluntary acts of the insolvent and some others are involuntary. The involuntary acts are of a kind by which a creditor is able to compel a debtor to disclose his insolvent condition even if the insolvent is careful enough not to commit a voluntary act of insolvency. One such act is that the insolvent has been imprisoned in execution of a decree of any Court for payment of money, and another is that any of his property has been sold in execution of a decree of any Court for payment of money. In this case the property of the appellant

1. (1942) 1 M.L.J. 38 : A.I.R. 1942 Mad. 306,



was sold on 19th September, 1956 in execution of a money decree against him and therefore there is no question that he was guilty of an act of insolvency described in section 6 (e) of the Provincial Insolvency Act

Under section 7 a creditor is entitled to present a petition in the insolvency Court against a debtor if he has committed an act of insolvency provided (as laid down in section 9 (1) (c)) the petition is made within three months of the act of insolvency on which the petition is grounded. In this case both these conditions are fulfilled. There is thus no doubt that the petitioning creditors' application under section 7 complied with section 6 (e) and section 9 (1) (c) of the Provincial Insolvency Act. The petitioning creditors alleged that the appellant was indebted to the extent of Rs 200,000 and this was not denied by the appellant. In the trial of one of the execution petitions filed against him by a decree holder the appellant admitted that he had no means to pay the decree debt because "all his properties were under attachment and were being brought to sale". He also stated that he was not in a position to discharge the debts. It is, therefore, clear that the appellant who was in more than embarrassed pecuniary circumstances was unable to pay his debts. It was also clear from the evidence, which the District Court and the Subordinate Judge have concurrently accepted, that he had made some transfers to screen his properties from his creditors and had suffered a decree for maintenance in a suit by his wife. In view of these facts which the appellant cannot now deny he is driven to support his case by argument on law. The argument, as we have seen is two fold. We are not inclined to accept either leg of the argument.

An act of insolvency once committed cannot be explained or purged by subsequent events. The insolvent cannot claim to wipe it off by paying some of his creditors. This is because the same act of insolvency is available to all his creditors. By satisfying one of the creditors the act of insolvency is not erased unless all creditors are satisfied because till all creditors are paid the debtor must prove his ability to meet his liabilities. In this case the petitioning creditors had their own decrees. It was in the decree of another creditor that the payment was made but only after the act of insolvency was committed. Besides the petitioning creditors there were several other creditors to whom the appellant owed large sum of money and his total debts aggregated to Rs 2 lakhs. It is plain that any of the remaining creditors including the petitioning creditors could rely upon the act of insolvency even though one or more creditors might have been paid in full. The act of insolvency which the appellant had committed thus remained and was not purged by payment of decretal amount after the sale in execution of the money decree.

The next question is whether the Subordinate Judge should have exercised his discretion under section 25 to dismiss the petition of the creditors treating the deposit of the money as sufficient cause. Section 25 of the Provincial Insolvency Act is in wide terms but it is impossible to give effect to those wide terms so as to confer a jurisdiction to ignore an act of insolvency at least in cases where the debtor continues to be heavily indebted and there is no proof that he is able to pay his debts. The section reads as follows —

25 *Dismissal of petition*—(1) In the case of a petition presented by a creditor where the Court is not satisfied with the proof of his right to present the petition or of the service on the debtor of notice of the order admitting the petition or of the alleged act of insolvency or is satisfied by the debtor that he is able to pay his debts or that for any other sufficient cause no order ought to be made the Court shall dismiss the petition.

(2) \* \* \* \* \*

The section expressly mentions three circumstances in which the petition made by a creditor must be dismissed namely, (i) the absence of the right of the

II]

creditor to make the application; (ii) failure to serve the debtor with the notice of the admission of the petition; and (iii) the ability of the debtor to pay his debts. In addition the Court has been given a discretion to dismiss the petition if it is satisfied that there is other sufficient cause for not making the order against the debtor. The last clause of the section need not necessarily be read *ejusdem generis* with the previous ones but even so there can be no sufficient cause if, after an act of insolvency is established the debtor is unable to pay his debts. The discretion to dismiss the petition can only be exercised under very different circumstances. What those cases would be, it is neither easy nor necessary to specify, but examples of sufficient cause are to be found when the petition is malicious and has been made for some collateral or inequitable purpose such as putting pressure upon the debtor or for extorting money from him or where the petitioning creditor having refused tender of money, fraudulently and maliciously files the application. An order is sometimes not made when by the receiving order the only asset of the debtor would be destroyed such as a life interest which would cease on his bankruptcy. Cases have also occurred where a receiving order was not made because there were no assets and it would have been a waste of time and money to make a receiving order against the debtor. These examples merely illustrate the grounds on which orders are generally made in the exercise of the discretion conferred by the last clause of section 25. This case is clearly one which cannot be treated under that clause. There are huge debts and no means to pay even though there are properties which, if realised, may satisfy at least in part the creditors of the appellant. The appellant was clearly guilty of an act of insolvency and an act of insolvency cannot be purged by anything he may have done subsequently. There is no proof of malicious or inequitable dealing on the part of the petitioning creditors. They have proved the necessary facts and have established both the act of insolvency and the inability of the appellant to pay his debts. The appellant has not been able to prove that he is able to pay. In fact, he has admitted that he is unable to pay his debts.

The High Courts have taken a similar and uniform view of such cases. These rulings are quite numerous but the following may be seen: *Pratapmall Rameshwar v. Chunnilal Jahuri*<sup>1</sup>, *Lal Chand Chaughuri v. Bogha Ram and others*<sup>2</sup> and *Venkatakrishnayya v. Malakondayya*<sup>3</sup>. We do not consider it necessary to examine the facts in those cases because they apply correctly the principles, which we have set out above to the facts in the cases then present. It is, therefore, quite clear that the adjudication of the appellant and the receiving order against him were properly made. In the result the appeal fails and is dismissed. There will be no order as to costs.

*Appeal dismissed.*

K. G. S.

1. A.I.R. 1933 Cal. 417.  
2. A.I.R. 1938 Lah. 819.

3. (1942) 1 M.L.J. 38.

## THE SUPREME COURT OF INDIA

## (Civil Appellate Jurisdiction)

PRESENT —P B GAJENDRAGADKAR, *Chief Justice*, K N WANCHOO  
M HIDAYATULLAH, AND V RAMASWAMI, JJ

The Punjab Sikh Regular Motor Service, Moudhapara, Raipur *Appellants\**

*v*  
The Regional Transport Authority, Raipur and another *Respondents*

*Motor Vehicles Act (IV of 1939) sections 58 and 63 and G P and Berar Motor Vehicles Rules 1940 rules 61 62 and 63—Scope—Inter regional permits renewal of—Renewal of counter signature for a different region—Authority competent to make—Word may in rule 63 (a)*

On a petition under Article 226 of the Constitution 1950 by the second respondent herein the High Court of Madhya Pradesh quashed the order of counter-signature by the Regional Transport Authority Raipur of the inter regional permit renewed by the Road Transport Authority Bilaspur on the ground that the application therefor was not made within the time fixed under section 63 (3) read with section 58 (2) of the Motor Vehicles Act (IV of 1939). The appellant preferred the instant appeal with the certificate of the High Court.

*Held* this appeal has to be dismissed on other grounds. The Regional Transport Authority Raipur is not competent to countersign (under G. P. and Berar Motor Vehicles Rules 1940) the permit renewed by the Regional Transport Authority, Bilaspur in the instant case.

The Central Provinces and Berar Motor Vehicles Rules 1940 were made by the appropriate Authority under Act (IV of 1939) and admittedly the said Rules were in operation in the two regions Bilaspur and Raipur at the material time. Rule 61 substantially incorporates the provisions of section 58 (2) of the Act and makes certain incidental provisions. Clause (a) of rule 62 provides that the application for renewal for counter-signature be made within the appropriate period under rule 61, but rule 62 (a) is subject to rule 63 which enables the authority renewing the permit to countersign the permit in the prescribed manner unless the Authority which originally countersigned had by general or special order before the expiry of the permit otherwise directed. The word 'may' in rule 63 (a) must be held to be obligatory in the context thereof.

Enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right. Therefore the Regional Transport Authority Raipur, was not competent to renew the counter-signature on the permit renewed by the Authority Bilaspur, which authority alone is competent under rule 63 (a).

Appeal from the Judgment and order, dated 13th November, 1964, of the Madhya Pradesh High Court in Miscellaneous Petition No. 373 of 1964.

M. S. Gupta, Advocate, for Appellant.

B. R. L. Iyengar, Advocate, (*amicus curiae*), for Respondent.

The Judgment of the Court was delivered by

Ramaswami, J.—On 7th August, 1963 the Regional Transport Authority Bilaspur, granted to the Punjab Sikh Regular Motor Service (hereinafter called the appellant), renewal of a stage carriage permit for an inter regional route—Saraipalli to Sarangarh—in the State of Madhya Pradesh. The permit was valid upto 5th August, 1963, and by the order of renewal, dated 7th August, 1963, the permit was renewed for a period of three years. On 13th September, 1963, the appellant applied to the Regional Transport Authority, Raipur, for renewal of the grant of counter-signature on the renewed permit. Respondent No. 2 objected to the

renewal of grant of counter-signature on the ground that the application of the appellant, dated 13th September, 1963, was barred by time. The Regional Transport Authority, Raipur, held that the application for renewal of the grant of counter-signature was not made within the time prescribed by rule 62 of the Central Provinces and Berar Motor Vehicles Rules but it took the view that the application for renewal had been filed within six weeks of the date of the passing of the order of renewal of the permit by the Regional Transport Authority, Bilaspur and therefore the application for the renewal of the grant of counter-signature could not be rejected on the ground that it was time-barred. The Regional Transport Authority, Raipur, accordingly granted the renewal of the counter-signature on the permit by its order, dated 24th February, 1964. Respondent No. 2 thereafter applied to the High Court of Madhya Pradesh under Article 226 of the Constitution of India for a writ quashing the order, dated 24th February, 1964, passed by the Regional Transport Authority, Raipur. The High Court took the view that an application for renewal of the grant of counter-signature must be made within the period prescribed by section 58 (2) of the Motor Vehicles Act and the appellant having failed to apply within that period, the application of the appellant for renewal of the counter-signature on the permit was barred and the Regional Transport Authority, Raipur, had no jurisdiction to countersign the permit renewed by the Regional Transport Authority, Bilaspur. The High Court accordingly quashed the order, dated 24th February, 1964, passed by the Regional Transport Authority, Raipur. This appeal is brought by the appellant with a certificate granted by the High Court under Article 133 (1) (c) of the Constitution.

It is advisable at this stage to refer to the material provisions of the Motor Vehicles Act (IV of 1939) which have a bearing on the validity of the order of the Regional Transport Authority, Raipur, dated 24th February, 1964. Section 45 of the Motor Vehicles Act provides that every application for a permit shall be made to the Regional Transport Authority of the region in which it is proposed to use the vehicle or vehicles. By the proviso to section 45 it is enacted that where it is proposed to use the vehicle or vehicles in two or more regions lying within the same State, the application shall be made to the Regional Transport Authority of the region in which the major portion of the proposed route or area lies. Section 47 sets out the procedure of the Regional Transport Authority in considering applications for stage carriage permits and prescribes the matters which may be taken into account by that officer in granting or rejecting the applications for stage carriage permits. Section 48 provides that subject to the provisions of section 47, a Regional Transport Authority may, on an application made to it, grant a stage carriage permit, in accordance with the application or with such modifications as it deems fit, valid for a specified route or routes or a specified area. Section 57 prescribes the procedure in "applying for and granting permits". It is provided by sub-section (2) of section 57 that an application for a stage carriage permit or a public carrier's permit shall be made not less than six weeks before the date on which it is desired that the permit shall take effect, or, if the Regional Transport Authority appoints a date for the receipt of such applications, on such date. Section 58 (1) provides that a stage carriage permit or a contract carriage permit other than a temporary permit shall be effective without renewal for such period not less than three years and more than five years, as the Regional Transport Authority may specify in the permit. Sub-section (2) enacts that a permit may be renewed on an application made and disposed of as if it were an application for a permit, provided that the application for the renewal of a permit shall be made (a) in the case of a stage carriage permit or a public carrier's permit, not less than sixty days before the date of its expiry, and (b) in any other case, not less than thirty days before the date of its expiry. By sub-section (3) the Authority is, notwithstanding anything contained in the first proviso to sub-section (2), authorised to entertain an application for

the renewal of a permit after the last date specified in the said proviso, if the application is made not more than fifteen days after the said last date. Section 63 deals with inter regional and inter-State permits. The material parts of that section are

(1) Except as may be otherwise prescribed a permit granted by the Regional Transport Authority of any one region shall not be valid in any other region unless the permit has been countersigned by the Regional Transport Authority of that other region and a permit granted in any one State shall not be valid in any other State unless countersigned by the State Transport Authority of that other State or by the Regional Transport Authority concerned.

Provided

(2) A Regional Transport Authority when countersigning the permit may attach to the permit any condition which it might have imposed if it had granted the permit and may likewise vary any condition attached to the permit by the authority by which the permit was granted.

(3) The provisions of this Chapter relating to the grant, revocation and suspension of permits shall apply to the grant, revocation and suspension of counter-signatures of permits.

Provided

Section 68 (1) confers authority upon the State Government to make Rules for the purpose of carrying into effect the provisions of Chapter IV of the Act.

A stage carriage permit granted by a Regional Transport Authority therefore remains effective without renewal for a period of not less than three years and not more than five years as the authority may specify in the permit. A person desiring to obtain renewal of the permit must, in the case of a stage-carriage permit, make an application not less than sixty days before the date of its expiry, and the Authority has to deal with the application for the renewal as if it were an application for a permit. The procedure for obtaining renewal is assimilated to the procedure prescribed for an application for a first permit, but in order that there is no interruption in the transport service the Legislature has provided that the application for renewal shall be made not less than sixty days before the date of its expiry, it being assumed that the authority would be able, in the interval, to publish the application and to hear objections to the grant of renewal. Except as may be otherwise prescribed, an inter regional permit by a Regional Transport Authority in any region, is not valid unless the permit is countersigned by the Regional Transport Authority of that other region. The provisions of Chapter IV relating to the grant, revocation and suspension of permits apply to the grant, revocation and suspension of counter signatures of permits.

The High Court has held, in the present case, that an application for renewal of counter signature has also to be made not less than sixty days before the date of its expiry and if no such application is made, the Regional Transport Authority has no power to countersign the permit, and upon that ground the High Court has quashed the order of the Regional Transport Authority, Raipur, dated 24th February, 1964, granting counter signature of the permit. It was argued on behalf of the appellant that the period of limitation prescribed by section 58 of the Motor Vehicles Act cannot be applied to an application for counter signature of a renewed permit. It was submitted that the question of counter signatures cannot arise unless and until the permit was first renewed and therefore it was erroneous to say that an application for counter signature should be made even before the permit was renewed and within the time prescribed by section 58. The contrary view was put forward on behalf of Respondent No. 2. It was contended that in the case of an inter regional route, the counter signature and confirmation of the grant made by the Regional Transport Authority having jurisdiction to grant a permit for the inter regional route. It was pointed out that under section 63 (3) of the Motor Vehicles Act the provisions of Chapter IV

relating to grant, revocation and suspension of permits apply to the grant, revocation and suspension of counter-signatures of permits and therefore the provisions of sections 57 and 58 about the making of an application for the grant of a permit, the time within which it must be made and the procedure that must be followed, apply equally in the matter of the grant of counter-signatures and that as section 58 laid down that an application for renewal of a permit must be made, in the case of a stage carriage permit, not less than sixty days before the date of its expiry, it necessarily followed that an application for counter-signature of the renewed permit for inter-regional route had to be made to the Regional Transport Authority concerned within sixty days before the date of the expiry of the permit.

We do not think it is necessary to express any opinion on the contentions advanced by the parties on this aspect of the case, for we are of the view that on a proper construction of the rules made by the State Government in regard to the grant of permits and counter-signatures of inter-regional permits the Regional Transport Authority, Raipur, was not competent to renew the counter-signature on the permit for the inter-regional route granted by the Regional Transport Authority, Bilaspur, in the present case. Under the Motor Vehicles Act, 1939, the Central Provinces and Berar Motor Vehicles Rules, 1940, were made by the appropriate authority and it is the admitted position that these Rules were at the material time in operation in the two regions—Bilaspur and Raipur in the State of Madhya Pradesh with which we are concerned. By rule 61 it is provided:

“(a) Application for the renewal of a permit shall be made in writing to the Regional Transport Authority by which the permit was issued not less than two months, in the case of a stage carriage permit or a public carrier's permit, and not less than one month in other cases, before the expiry of the permit, and shall be accompanied by Part A of the permit. The application shall state the period for which the renewal is desired and shall be accompanied by the fee prescribed in rule 55.

(b) The Regional Transport Authority renewing a permit shall call upon the holder to produce Part B or Parts A and B thereof, as the case may be, and shall endorse Parts A and B accordingly and shall return them to the holder.”

By rule 62 clause (a) it is provided:

“Subject to the provisions of rule 63 application for the renewal of a counter-signature on a permit shall be made to the Regional Transport Authority concerned and within the appropriate periods prescribed by rule 61 and shall, subject to the provisions of sub-rule (b), be accompanied by Part A of the permit. The application shall set forth the period for which the renewal of the counter-signature is required.”

By rule 63 clause (a) it is provided:

“The authority by which a permit is renewed may, unless any authority by which the permit has been countersigned (with effect not terminating before the date of expiry of the permit) has by general or special order otherwise directed, likewise renew any counter-signature of the permit (by endorsement of the permit in the manner set forth in the appropriate form) and shall, in such case, intimate the renewal to such authority.”

Rule 61 substantially incorporates the provisions of sub-section (2) of section 58 of the Motor Vehicles Act and the proviso thereto, and makes certain incidental provisions. Clause (a) of rule 62 provides that the application for renewal of counter-signature of a permit shall be made to the Regional Transport Authority concerned and within the appropriate period prescribed by rule 61 but the provisions of rule 62 (a) are subject to the provisions of rule 63 (a) which confers power upon the Authority which grants renewal of inter-regional permit under the first proviso to section 45 to countersign the permit so as to make it valid for the other region covered by the route. Therefore, even though by section 63 the power to countersign the permit is entrusted to the Regional Transport Authority of the region in which the remaining part of the route is situate, the effect of rule 63 is that the power to countersign the permit is vested in the

Authority which grants the renewal of the permit. The Legislature has by providing in the opening part of sub section (1) of section 63 "except as may be otherwise prescribed" made the provision subject to the Rules framed by the State Government under section 68 of the Motor Vehicles Act. The provisions of rule 63, therefore, must supersede the direction contained in section 63 (1) of the statute and the Regional Transport Authority, Bilaspur, was competent in the present case to grant counter signature of the permit even in so far as it related to the Raipur Region. On behalf of the appellant attention was drawn to the expression "may" in rule 63. But in the context and the language of the rule the word "may" though permissive in form, must be held to be obligatory. Under rule 63 the power to grant renewal of the counter signature on the permit in the present case is conferred on the Regional Transport Authority, Bilaspur. The exercise of such power of renewal depends not upon the discretion of the authority but upon the proof of the particular case out of which such power arises. Enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right' (See *Julius v Bishop of Oxford*)<sup>1</sup>. If the Regional Transport Authority, Bilaspur, had power to renew the counter signature on the permit under rule 63, it must be held that the Regional Transport Authority, Raipur, had no such power under rule 62 because the latter rule is expressly made subject to the provisions of rule 63, and the power granted to the Regional Transport Authority under rule 62 is taken away by the provisions of rule 63. It follows, therefore, that the Regional Transport Authority, Raipur, was not competent to renew the counter signature on the permit in the present case as the Regional Transport Authority, Bilaspur, was alone competent to renew the counter signature of the permit. We accordingly hold that the order of the Regional Transport Authority, Raipur, dated 24th February, 1964, granting counter signature of the permit was illegal and *ultra vires* and was rightly quashed by the High Court by its order, dated 13th November, 1964.

We, therefore, confirm the order of the High Court, but for different reasons. We, however, desire to make it clear that our order does not affect the validity of the permit granted to the appellant by the Regional Transport Authority, Bilaspur, in so far as it relates to the route within the limits of Bilaspur Region. That is the ratio of the decision of this Court in *Messrs Bundelkhand Motor Transport Company, Nongaoon v Behari Lal Chaurasia and another*<sup>2</sup> in which it was pointed out that inter regional permit when granted is valid for the region over which the authority granting the permit has jurisdiction even though it is not countersigned by the proper Regional Transport Authority with regard to the portion of the route outside that region.

We accordingly dismiss this appeal. There will be no order as to cost. We desire to express our thanks to Shri Iyengar who acted as *amicus curiae* in this case.

K. G. S

*Appeal dismissed*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—K. SUBBA RAO, K. N. WANCHOO, J. C. SHAH, S.M. SIKRI AND V. RAMASWAMI, JJ.

The State of Bombay (now Gujarat)

... Appellant\*

v.

Jagmohandas and another

.. Respondents.

*Bombay Sales Tax Act (V of 1946), sections 13 and 20 (Bombay Sales Tax Act (XXIV of 1952), sections 19 and 29)—Advance tax paid by a registered dealer—Provision void under Article 286 (1) (a) of the Constitution (1950)—Discovered as void in 1952—Suit for refund of tax paid—Mistake of law—If barred—Limitation Act (IX of 1908), Article 96.*

A registered dealer paid advance tax on the basis of his turnover and discovered on the promulgation of Bombay Ordinance (II of 1952) that the provision for tax was void under Article 286 (1) (a) of the Constitution. He then filed a suit for refund of advance tax paid under a mistake of law. The suit was decreed by the Bombay High Court.

On appeal from the decree to the Supreme Court :

*Held, per Sikri, J.* (on behalf of the majority).—Section 20 of the Act (V of 1946) does not bar the suit as admittedly there was no assessment made and the plaintiff (respondent) has not questioned any assessment or order made under the Act.

Filing a return and paying the advance tax on its basis is not a case of self-assessment as contended for; 'assessment' in section 20 has reference only to assessment under section 11 or 11-A of the Act.

As held in the *Tripura case*, (1965) 16 S.T.C. 613, Article 96 of the Limitation Act applies in the instant case and the starting point is when the mistake became known to the plaintiff.

No refund can be applied for under section 13 until an order of assessment to tax has been made; no machinery is provided in that section for dealing with the objection that the money was paid by virtue of a void provision of the Act. Further, the Sales Tax Authorities are not competent to entertain questions as to the *ultra vires* of any provision of the Act. Therefore, section 13 does not create an implied bar to the suit being entertained.

*Per Shah, J.*—While agreeing with the order proposed and all other points, the jurisdiction of the Sales Tax Authorities to decide if Article 286 (1) (a) applied to the sales in question was not affected at all at the relevant time.

Appeals from the Judgments and Decrees, dated 15th/25th March, 1960, of the Bombay (now Gujarat) High Court in First Appeals Nos. 44 and 45 of 1959 respectively.

*S. V. Gupte*, Solicitor-General of India (*R. Ganapathi Iyer, M. S. K. Sastri, R. H. Dhebar and B. R. G. K. Achar*, Advocates, with him), for Appellant.

*G. S. Pathak*, Senior Advocate, and *M. M. Vakil*, and (*J. B. Dadachanji, O. C. Mathur and Ravinder Narain*, Advocates of *M/s. J. B. Dadachanji & Co.*, with him), for Respondents.

The Court delivered the following Judgments :

*Sikri, J.* (for himself, *Subba Rao, Wanchoo and Ramaswami, JJ.*)—These are two appeals on certificates granted by the High Court of Bombay and raise the same questions of law. It is, therefore, only necessary to give facts in Civil Appeal No. 219 of 1964, which are as follows. *M/s. Jagmohandas Masruwala*, a registered dealer under the Bombay Sales Tax Act, 1946 (Bombay Act V of 1946) filed Original Suit No. 10 of 1956 against the State of Bombay for recovery of Rs. 31,852-8-3 which they had paid as advance

\* C.A. Nos. 219 and 273 of 1964.



sales tax on various dates when submitting returns for the period 26th January, 1950 to 31st March, 1951, and interest thereon at 4 per cent viz., Rs 2 998. The suit was filed on the allegations that the amount was paid as advance tax in respect of sale of goods effected outside the State of Bombay. These sales were taxable under the Bombay Sales Tax Act, 1946 (hereinafter referred to as the Act). It was further alleged that the Act became void by virtue of Article 286 (1) (a) of the Constitution on 26th January, 1950, and this amount was paid under a mistake of law and that the mistake was discovered when the Governor of Bombay promulgated Bombay Ordinance No 11 of 1952.

The State of Bombay raised various pleas but we are concerned with two: (1) that the suit was barred by sections 13 and 20 of the Bombay Sales Tax Act, 1946, and sections 19 and 29 of the Bombay Sales Tax Act, 1952, and (2) that the suit was barred by limitation. The Second Joint Civil Judge, Senior Division, Surat, held that the suit was not barred under the statutory provisions above-mentioned and that it was filed within limitation. He passed a decree in favour of the plaintiff for a sum of Rs 35,850-8-3 with future interest from the date of the suit at 4 per cent per annum on Rs 31,852-8-3 together with the cost of the suit.

The State of Bombay appealed to the High Court. It was urged before the High Court, as has been urged before us, that the Act was a complete Code and the issue of law relating to non-maintainability of the suit was, for all practical purposes, answered by the conclusions reached by their Lordships of the Privy Council in *Raleigh Investment Co., Ltd v Governor General in Council*<sup>1</sup>, in examining the provisions of section 67 of the Income Tax Act which are very similar to those of section 20 of the Sales Tax Act, 1946. The High Court held that the present case must be governed by the opinion expressed by this Court in *The State of Tripura v The Province of East Bengal*<sup>2</sup>. On the question of limitation, the High Court held that the case fell within the purview of Article 96 of the Limitation Act and the *terminus quo* of that Article is the date on which the mistake becomes known to the plaintiff. It expressed agreement with the Court below that the mistake of law became known to the plaintiff on a date which brings the suit within the period prescribed by the Law of Limitation. The High Court further held that the trial Court was in error in allowing interest as damages. In the result, the High Court varied the decree by omitting the directions as regards the payment of interest as damages but otherwise affirmed the decree. Having obtained the certificate of fitness from the Bombay High Court, the State of Bombay has now come up on appeal to this Court.

The learned Solicitor-General has raised two points on behalf of the appellant. First that the suit was either expressly barred by section 20 of the Bombay Sales Tax Act, 1946, or was impliedly barred by virtue of section 13 of the Bombay Sales Tax Act, 1946, and (2) that the suit was barred by limitation. We are unable to appreciate how section 20 expressly bars the suit. It is admitted that no assessment has been made under the Act and the plaintiff has not in his suit called into question any assessment or order made under the Act. In our opinion, this part of the argument is covered by the decision of this Court in the *Tripura case*<sup>3</sup>, and the High Court was right in so holding.

The learned Solicitor-General then attempted to distinguish the *Tripura case*<sup>3</sup> by saying that there was in the Bengal Agricultural Income Tax Act, 1944, no section like section 13 and no reliance was placed by this Court in that case on the existence of adequate machinery as was done by this Court in *Kamla Mills case*<sup>4</sup>. In effect he seemed to suggest that the *Tripura case*<sup>3</sup> was inconsistent with the decision of this Court in *Kamla Mills case*<sup>4</sup>. We are unable to accede to

<sup>1</sup> (1947) 2 M.L.J. 16 L.R. 74 LA 50

<sup>2</sup> (1951) S.C.J. 70 (1951) S.C.R. 1 19 I.T.R.

<sup>3</sup> (1963) 16 S.T.C. 613

<sup>4</sup> A.I.R. 1965 S.C. 1942

this contention. The judgment of Fazl Ali, J., who dissented in the *Tripura case*<sup>1</sup> clearly shows that the Court was fully aware of the existency of the machinery in the Act enabling an assessee to challenge an eventual assessment. But this Court, in spite of the existence of that machinery gave effect to the plain words of section 65 of the Bengal Agricultural Income tax Act, 1644. There is nothing in the *Kamla Mills case*<sup>2</sup> which is inconsistent with *Tripura case*.<sup>1</sup> Further Mr. Pathak, learned Counsel for the respondent, pointed out that a section similar to section 13 existed in the Bengal Agricultural Income-tax Act, 1944.

Another point raised by the learned Solicitor-General was that when a registered dealer files a return and calculates and pays tax on the basis of the return, he in effect makes a self-assessment and, therefore, brings himself within section 20 of the Act. We are unable to read the word 'assessment' in section 20 to include a mere filing of return and payment by a registered dealer. In our opinion, the word 'assessment' has reference to assessments made under sections 11 and 11-A of the Bombay Sales Tax Act, 1946. Therefore, we must overrule the contention of the learned Solicitor-General that section 20 expressly bars the present suit.

Coming now to the argument that section 13 impliedly bars the suit, it is necessary to set out section 13 of the Act. Section 13 reads as follows:

"The Commissioner shall, in the prescribed manner, refund to a registered dealer applying in this behalf any amount of tax paid by such dealer in excess of the amount due from him under this Act, either by cash payment or, at the option of the dealer, by deduction of such excess from the amount of tax due in respect of any other period :

Provided that no claim to refund of any tax paid under this Act shall be allowed unless it is made within twenty-four months from the date on which the order of assessment was passed or within twelve months of the final order passed on appeal, revision, or reference in respect of the order of assessment, whichever period is later:

Provided further that the Collector shall first apply the excess paid in respect of any period towards the recovery of any amount in respect of which a notice under sub-section (4) of section 12 may have been issued and shall then refund the balance remaining, if any."

The first part of the section imposes a statutory obligation on the Commissioner to refund any amount of tax paid by a registered dealer in excess of the amount due from him under this Act. The first proviso prescribes the period within which the registered dealer can apply for refund. The period is 24 months from the date on which the order of assessment is passed or within 12 months of the final order passed on appeal in respect of the order of assessment, whichever period is later. It is apparent that the dealer cannot apply for refund under section 13 till an order of assessment is passed. The prescribed form also shows the same thing. The scheme of section 13 appears to be that the Sales Tax Officer would make first an order of assessment, arrive at the amount of tax due according to the order and then work out the excess, if any, paid by the dealer and refund that money. It seems to us that section 13 does not contemplate objections being entertained regarding the constitutional validity of any payment made by the dealer. The Solicitor-General contended that an appeal would lie against an order made under section 13. Assuming that it is so, the appeal would be only on the ground that the computation made by the Sales Tax Officer is erroneous and not on the ground that the tax paid by the dealer was not constitutionally payable at all, under the Act. Therefore, if section 13 is understood in the manner mentioned above, it seems clear to us that no machinery is provided in section 13 for dealing with the objection that the money paid was paid by virtue of a void provision of the Act.

1. (1951) S.C.J. 70: (1951) S.C.R. 1: 19 I.T.R. 132.

2. (1965) 16 S.T.C. 613: (1965) 57 I.T.R. 643: A.I.R. 1965 S.C. 1942.

Further, we have held in *M/s K S Venkataraman v The State of Madras*,<sup>1</sup> that the Sales Tax Authorities created by the Madras General Sales Tax Act are not competent to entertain questions as to the *ultra vires* of a provision of the Act. Similarly the Commissioner appointed under the Bombay Sales Tax Act would not be competent to go into the question whether section 6 of the Act under which the transactions were apparently taxable was *ultra vires* or not.

Therefore, in our opinion, section 13 of the Act does not create an implied bar and the High Court is right in holding that the suit was competent.

This Court has recently held that Article 96 applies to suits like the present (See *State of Kerala v Aluminium Industries Ltd., Kunda*).<sup>2</sup>

The only point that remains is regarding the date of the knowledge of the plaintiff. Both Courts below have found that the plaintiff came to know of the mistake on 22nd December, 1952, the date of the promulgation of Governor's Ordinance. This is a concurrent finding of fact and the learned Solicitor General has not shown us any good ground for disturbing this concurrent finding of fact.

Accordingly, agreeing with the High Court, we hold that the suit is not barred. In the result the appeals fail and are dismissed with costs. One hear ing fee.

*Shah, J* (for himself and Ramaswami, J).—These appeals arise out of suits filed by the two respondents for recovery of sums of money paid by them as advance sales tax under a mistake of law. The suits were decreed by the Court of First Instance and the decisions were confirmed in appeals by the High Court of Judicature at Bombay.

There were no orders of assessment made by the taxing authorities but the tax payers being of the view that the tax on their turnover was payable submitted returns under the Bombay Sales Tax Act, 1946 and paid advance tax. The sales were in respect of goods consigned to purchasers outside the State of Bombay and for consumption outside the State. These sales were apparently covered by the terms of Article 286 (1) (a) before it was amended by the Sixth Amendment Act and could not be taxed under a statute enacted by a State. The tax payers claimed that they had discovered their mistake when the Governor of Bombay promulgated Bombay Ordinance 2 of 1952 after the decision of the Bombay High Court in *The United Motors (India) Ltd v The State of Bombay*.<sup>3</sup> The trial Court and the High Court have rejected the contention raised by the State that the suits were barred by sections 13 and 20 of the Bombay Sales Tax Act, 1946, which were later replaced by sections 19 and 20 of the Bombay Sales Tax Act, 1952, and that the suits were barred by the law of limitation.

We agree with the judgment of our brother Sikri J., that the suits were not barred either expressly by the provisions of section 20 or impliedly by section 13 of the Bombay Sales Tax Act, 1946. We also agree with him that the suits were not barred by the law of limitation since the suits were filed within the period prescribed by Article 96 of the first Schedule of the Limitation Act, 1908 i.e., within three years from the date on which the mistake became known to the taxpayers. We are unable, however, to agree with the observations that before the sales tax authorities an objection that certain parts of the statute were *ultra vires* the Legislature could not be raised. As held by this Court in *M/s Kamla Mills Ltd v The State of Bombay*<sup>4</sup> the question whether a transaction which falls within the Explanation to Article 286 (1) (a) before it was amended by the Consti

<sup>1</sup> (1966) 111 T.J. 415 (1966) 1 S.C.J. 515  
(1966) 1 M.L.J. (S.C.) 108 (1966) 1 A.W.R.  
(S.C.) 108 (1966) 60 I.T.R. 112

<sup>2</sup> C.A. No. 720 of 1963 decided on 21st

April 1965

<sup>3</sup> (1952) 55 Bom.L.R. 256

<sup>4</sup> (1965) 16 S.T.C. 613 (1965) 57 I.T.R. 613

ution (Sixth Amendment) Act does not affect the jurisdiction of the taxing authority: It is merely a question of interpretation of the contract in the light of the statute and the sales tax authorities are entitled to entertain the objection, if it be raised before them, that the transaction was not taxable because the State had no power to legislate in respect of an *Explanation* sale. But in this case, that stage was never reached. The tax-payers in the belief that they were liable to pay tax paid advance tax before any orders of assessment were made. Thereafter realising that they had committed a mistake filed suits for refund. Thereby they were seeking to obtain orders of refund of payments made under a mistake of law: they were not seeking to set aside any order of assessment.

We agree therefore that the appeals should be dismissed with costs.

K.G.S.

*Appeals dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, M. HIDAYATULLAH AND R. S. BACHAWAT, JJ.

Kehar Singh and others

.. *Appellants\**

v.

Dewan Singh and others

.. *Respondents.*

*Custom—Punjab—Jats in Amritsar District—Customary adoption—Adopted son when entitled to collateral succession.*

Under the customary law of the Jats in Amritsar District, where the customary adoption is formal and the adopted son is completely transplanted in the family of the adoptive father, he is entitled to succeed to the collateral relatives of the adoptive father. On the other hand, if the customary adoption amounts to a mere appointment of an heir, the appointed heir is not entitled to succeed to the collateral relatives of the adoptive father.

Appeal from the Judgment and Decree dated the 6th October, 1958, of the Punjab High Court in Civil Regular Second Appeal No. 340 of 1953.

*Gopal Singh*, Advocate, for Appellants and Respondent No. 11.

*N. N. Keswani*, Advocate, for Respondent No. 1

The Judgment of the Court was delivered by

*Bachawat, J.*—The parties are Aulakh Jats of Tehsil Ajnala in Amritsar District, and are governed by customary law in matters of succession and adoption. The dispute concerns succession to the property of the Santa Singh *alias* Din Mohammad. Santa Singh has not been heard of for a long time and is presumed to be dead. The revenue authorities sanctioned mutation of the lands left by him in favour of the defendants, who are his collaterals of the 8th degree. One Megh Singh was the collateral of Sant Singh in the 5th degree. Megh Singh died more than 50 years ago. Before his death, he adopted his daughter's son, one Kala Singh. Kala Singh has died leaving his sons, Dewan Singh and Gian Singh as his heirs. Dewan Singh and Gian Singh instituted a suit in the Court of the Subordinate Judge, First Class, Ajnala, praying for a decree for possession of the lands left by Santa Singh and alleging that Megh Singh adopted Kala Singh as his son, took him out of his natural family, transplanted him completely in the family of Megh Singh and bestowed on him the rights of a natural son, according

to the custom by which the parties were governed, Kala Singh was entitled to succeed as a reversionary heir in the family of his adoptive father and was the preferential heir of Santa Singh. The contesting defendants alleged that the adoption of Kala Singh amounted to the appointment of an heir only and they denied that according to custom Kala Singh was the reversionary heir of Santa Singh or entitled to inherit his lands.

The Subordinate Judge, Ajnala and the District Judge, Amritsar, concurrently held that the adoption of Kala Singh was the usual customary appointment of an heir. The trial Court also held that by the custom of Jats in Amritsar District an appointed heir was entitled to succeed collaterally in the family of his adoptive father and consequently, Kala Singh was the preferential heir of Santa Singh. On appeal, the District Judge, Amritsar set aside the decree passed by the trial Court, and dismissed the suit. He held that according to custom, the adoption of a daughter's son was not permissible and the adoption of Kala Singh was, therefore, invalid. He also held that under the customary law an adopted son could not succeed collaterally in his adoptive father's family if he was a non agnate, or if he did not belong to the Got of his adoptive father. On Second Appeal, the High Court set aside the order of the District Judge, Amritsar, and restored the decree passed by the trial Court. The High Court held that it was not open to the defendants to challenge the validity of the adoption of Kala Singh, as the point was not in issue between the parties, and under the customary law, Kala Singh, as the adopted son of Megh Singh, was entitled to succeed collaterally in his adoptive father's family. Some of the defendants now appeal to this Court on a certificate granted by the High Court.

In agreement with the High Court we hold that it is not open to the defendants to contend that the adoption of Kala Singh by Megh Singh was invalid. In the written statement, the defendants did not allege that Megh Singh had no power to adopt Kala Singh as Kala Singh was the daughter's son of Megh Singh. As the validity of the adoption was not in issue, the parties had no opportunity to lead any evidence on the question whether by the special custom of the parties Megh Singh could lawfully adopt his daughter's son.

The substantial point in controversy between the parties is whether by the custom governing the Jats of Amritsar District Kala Singh was entitled to succeed collaterally in the family of his adoptive father. Some general customs as to adoption are found to exist in the Punjab, and they are collected in Rattigan's Digest of Customary Law. Some of the customs observed in the several Districts and Tehsils of the Punjab are collected in the *Riwaj-i-am*. There is a presumption that the entries in the *Riwaj-i-am* are correct, and if there is a conflict between Rattigan's Digest and the *Riwaj-i-am* normally the *Riwaj-i-am* of the locality prevails see *Jai Kaur v Sher Singh*,<sup>1</sup> *Salig Ram v Munshi Ram*.<sup>2</sup> Judicial decisions furnish reliable instances in which the custom in question was recognised or departed from. Oral and documentary evidence of mutations and other transactions in which the custom was recognised or departed from are also relevant material to prove or disprove the custom.

A customary adoption in the Punjab is ordinarily no more than a mere appointment of an heir creating a personal relationship between the adoptive father and the appointed heir only, see *Mela Singh v Gurdas*.<sup>3</sup> There is no tie of kinship between the appointed heir and the collaterals of the adoptive father. The appointed heir does not acquire the right to succeed collaterally in the adoptive father's family. The status of the appointed heir is thus materially different from that of a son adopted under the Hindu law.

1 (1961) 2 S.C.J. 62 (1960) 3 S.C.R. 975 474-475

2 (1962) 1 S.C.J. 130 (1962) 1 S.C.R. 470 3 (1922) 3 I.L.R. Lah. 362 (P.B.)

The general custom negating the right of the appointed heir to succeed collaterally in the family of his adoptive father is stated in Article 49 of Rattigan's Digest of Customary Law, 13th Edn., page 572 thus:—

"49. Nor, on the other hand, does the heir acquire a right to succeed to the collateral relatives of the person who appoints him, where no formal adoption has taken place, inasmuch as the relationship established between him and the appointer is a purely personal one."

The rule in Article 49 does not apply to a formal adoption by the customary method. The customary formal adoption completely severs the connection of the adopted son with his natural family and transplants him from his natural family to the adoptive family. Such an adoption confers on the adopted son the right of collateral succession in the adoptive father's family and takes away the right of collateral succession in the natural family. The formal adoption may be made in accordance with custom and by observing the customary forms, and it is not necessary to comply with the rules of Hindu law in the matter of ritual or otherwise. See *Abdur Rehman v. Raghubir Singh*;<sup>1</sup> *Waryaman v. Kanshi Ram*.<sup>2</sup>

The Manual of Customary Law of the Amritsar District by H.D. Craik in 1914 records the following question and answer:—

"Question 91.—Can an adopted son succeed collaterally in the family of his adoptive father?"

Answer 91.—All the tribes state that an adopted son succeeds collaterally in the family of his adoptive father, with the exception of Brahmans and Khatrijs of Neshta, who say that he does not do so. The rule defined by the Courts, however, is that an adopted son has no right to succeed in this manner. The latest ruling on this point is P.R. 107 of 1913 in which it was held that among Jat Sikhas of the Tarn Taran tahsil an adopted son, appointed by the usual customary method, does not succeed to collaterals as his adoptive father's representative."

The English translation of the Urdu version of the *Riwaj-i-am* of the Amritsar District for the year 1940 (Exhibit P.C./1) records the following question and answer:—

No. of question	Question	Answer
90	Can an adopted son succeed collaterally in the family of his adoptive father?	All the tribes, yes. See Schedule I for relevant mutations. See Schedule II for judgments in civil cases.

Schedule I annexed to Exhibit P.C./1 gives 17 instances of mutations on collateral successions of adopted sons in the family of the adoptive father. Schedule II annexed to Exhibit P.C./1 is not printed in the paper book. The English version of the *Riwaj-i-am* of the Amritsar District published by A. MacFARQUHAR in 1947 gives the list of the relevant judicial decisions bearing on question 90. The decided cases show that where the adoption is by way of a customary appointment of an heir, the adopted son does not succeed collaterally in the adoptive father's family. The latest *Riwaj-i-am* refers to the Court rulings without disapproval. In the light of the decided cases, the entries in the *Riwaj-i-am* recognising the adopted son's right of collateral succession in the adoptive father's family should be taken to apply to cases of customary formal adoptions and not to cases of adoptions by way of customary appointments of heirs.

The relevant judicial decisions may be briefly noticed. In *Jawala Singh v. Mt. Lacmi and others*<sup>3</sup> (Gil Jats of Tahsil Ajnala, Amritsar), *Mangal Singh v. Tilak Singh*<sup>4</sup> (Sohel Jats of Tehsil Ajnala, Amritsar), *Chetu v. Jawand Singh and others*<sup>5</sup> (Sikh Jats of Tahsil Tarn Taran, Amritsar), it was held that an heir appointed under the customary law of Jats in the District of Amritsar does not acquire a right to succeed to the collaterals of the adoptive father, and in *Indar*

1. (1949) 51 P.L.R. 119.  
2. (1922) 3 I.L.R. Lah. 17.  
3. 14 P.R. of 1884.

4. 61 P.R. of 1894.  
5. 107 P.R. of 1913.

*Singh v Ml Gurdevi*<sup>1</sup> (Amritsar Jats), it was held that he was not a lineal descendant of the adoptive father within the meaning of section 59 of the Punjab Tenancy Act (XVI of 1887). Conversely, the appointed heir retains the right of collateral succession to his natural family. See *Jagat Singh v Ishar Singh*<sup>2</sup> (Amritsar Jats). On the other hand, according to the custom of Jats in the Amritsar District, in a case of a formal adoption effecting a complete transplantation of the adopted son in the adoptive father's family, the adopted son is entitled to inherit collaterally in the adoptive father's family. See *Teju v Kesar Singh*<sup>3</sup>, affirming the decision of Kapur, J., in *Teja Singh v Kesar Singh*<sup>4</sup>.

We thus find that under the customary law of Jats in Amritsar District, where the customary adoption is formal and the adopted son is completely transplanted in the family of his adoptive father, he is entitled to succeed to the collateral relatives of the adoptive father. This finding is in harmony with the *Riwaj-i-am* of the Amritsar District is supported by judicial decisions and is not in conflict with Article 49 of Rattigan's Digest. On the other hand, if the customary adoption amounts to a mere appointment of an heir, the appointed heir is not entitled to succeed to the collateral relatives of the adoptive father. This finding is in harmony with Article 49 of Rattigan's Digest and the judicial decisions, and is consistent with the *Riwaj-i-am*s properly interpreted in the light of the decided cases.

In *Teju v Kesar Singh*<sup>3</sup> it was said that the ordinary rule in Amritsar District is that the adoption is complete. In other cases, it was said that ordinarily such an adoption is by way of a customary appointment of an heir. The true rule appears to be that it is a question of fact in each case whether the adoption by a Jat in the Amritsar District is formal or informal. The adoption is formal if the parties manifest a clear intention that there should be complete change of the family of the adopted son, so that he ceases to be a member of his natural family and loses his right of collateral succession in that family and at the same time becomes a member of the adoptive father's family and acquires a right of collateral succession in the family. The loss of the right of collateral succession in the natural family is strong evidence to show that the adoption is formal and effects a complete change in the family. On the other hand, retention of the right of collateral succession in his natural family indicates that the adoption was informal by way of customary appointment of an heir.

The onus is upon the plaintiffs respondents to prove that the adoption of Kala Singh was formal and effected a complete change in his family. On the death of the adoptive father Megh Singh Kala Singh inherited the properties of Megh Singh and on the death of Kala Singh his sons, Gian Singh and Dewan Singh, inherited those properties. But these successions are consistent with the informal appointment of Kala Singh as an heir to Megh Singh. According to custom, the appointed heir succeeds to the properties left by the adoptive father, and on the death of the appointed heir, his male issue succeeds. See Rattigan's Digest of Customary Law, 13th Edn. Articles 52 and 54 pages 572-573. The succession of Kala Singh as the reversionary heir of one Mst Bhagan is cited as an illustration of collateral succession of the adopted son in his adoptive father's family in the list of mutations given in Schedule I of the *Riwaj-i-am* of 1940 (Exhibit P C/1). But the oral testimony on the record of this case discloses that Mst Bhagan, who was the widow of a predeceased son of Megh Singh, was given some land by Megh Singh for her maintenance, and on her death, Kala Singh succeeded to this land. It will appear, therefore, that Mst Bhagan got a life estate in this land and on her death, the land reverted to Kala Singh as the adopted son of Megh Singh. The succession of Kala Singh to this land is, therefore, not an instance of

1 A.I.R. 1930 Lah 897

2 I.L.R. 11 Lah 645

3 A.I.R. 1954 Punj 30

4 A.I.R. 1951 Punj 117

II]

collateral succession of Kala Singh in his adoptive father's family, and this was fairly conceded by learned Counsel for the respondents. Considering all the circumstances of the case, the trial Court and the first Appellate Court concurrently found that the adoption of Kala Singh was by way of customary appointment of an heir to Megh Singh. On Second Appeal, the High Court did not interfere with this finding. The finding is amply supported by the materials on the record. It appears that after his adoption Kala Singh succeeded to the lands left by one Makhan, his natural brother and by one Hira Singh, his collateral in his natural family. These collateral successions in the natural family strongly indicate that the adoption of Kala Singh did not effect a change in his family. The adoption of Kala Singh was no more than a mere appointment of an heir and by custom of the Ja's in the District of Amritsar he was not entitled to succeed collaterally in his adoptive father's family. For this reason, the suit out of which this appeal arises, must be dismissed.

The District Judge, relying on *Mangal Singh v. Tilok Singh*,<sup>1</sup> held that as Kala Singh was not an agnate of his adoptive father, he was not entitled to succeed collaterally in his adoptive father's family, even assuming that his adoption was valid. This aspect of the matter was not considered by the High Court at all.

In view of our conclusions on other points, we do not express any opinion on this point.

We allow the appeal, set aside the the decree passed by the High Court, restore the decree passed by the District Judge of Amritsar and direct that the suit be dismissed. The parties will pay and bear their own costs throughout.

*Appeal allowed.*

K.S.

## THE SUPREME COURT OF INDIA. (Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, Chief Justice, K. N. WANCHOO,  
M. HIDAYATULLAH, J. C. SHAH AND S. M. SIKRI, JJ.

... Appellant\*

Kalyani Stores

.. Respondents.

v.

.. Intervener.

The State of Orissa and others

The Advocate-General for the State of U.P.

*Bihar and Orissa Excise Act (II of 1915), section 27—Notification under, dated 31st March 1961—Levy of duty (countervailing) on foreign liquor imported from other States—No manufacture of foreign liquor in the State—Validity—Constitution of India (1950), Articles 301, 304, 305, 366 (10) and 372.*

The Government of Orissa, by a notification dated 31st March, 1961, issued under section 27 of the Bihar and Orissa Excise Act, 1915, imposed a duty of Rs. 70 per London Proof Gallon of foreign liquor imported into the State while the duty formerly was only Rs. 40 per London Proof Gallon under a notification of 1937. The appellant applied under Article 226 of the Constitution of India, 1950, challenging the constitutional validity of the notification contending that (i) it contravened Article 301 of the Constitution and (ii) no countervailing duty is leviable when there was no manufacture of 'foreign liquor' within the State and so no excise duty is levied.

The respondent contended that section 27 of the Act being an 'existing law' levy of the duty by the impugned notification issued in exercise of the powers conferred by the section is valid and cannot be questioned.

21st September, 1965.

\*C.A. No. 20 of 1964.

1. 61 P.R. of 1894.



(Section 27 of the Act II of 1915 as originally passed opened with the words "A duty at such rate or rates" instead of "An excise duty or countervailing duty at such rate or rates" which expression was substituted by the Order in Council—Adaptation of Laws Order, 1937—consequent on the passing of the Government of India Act, 1935 by the British Parliament)

*Held By the Full Court*—The Bihar and Orissa Excise Act is valid as 'existing law' within the meaning of Article 305 of the Constitution (as defined in Article 366 (10) thereof) and is preserved by Article 372 of the Constitution

The notification issued under section 27 of the Act in 1937 (before the Constitution) is also an existing law and constitutionally valid

*Per Shah J* (on behalf of majority)—In view of Article 366 (10) the 'existing law' under Article 305 which saves it from the provisions of Article 301 (declaring freedom of trade within India) must be one passed or made before the commencement of the Constitution (in the instant case section 27 and the notification issued thereunder in 1937)

The impugned notification of 1961 imposed an additional burden and it would be valid only if it complied with the constitutional requirements of Article 304 (i) (a) if the tax or duty imposed on goods imported from other States does not exceed the tax or duty imposed on goods manufactured in the State or (b) in the public interest

The increase in the duty by the notification of 1961 is not valid

*Per Hidayatullah J* (contra)—Since the Act was valid under the Government of India Act 1935, then by reason of Article 372 of the Constitution the Act must be deemed valid to this day. The absence of manufacture of foreign liquor in the State thus makes no difference to the validity of the duty imposed in exercise of the powers under section 27 of the valid Act

Neither Article 301 nor Article 304 (a) can come into play. The State Legislature has competence apart from Article 304 (a) to impose duties of excise on alcoholic liquors for human consumption produced in the State and countervailing duties on similar liquors imported from other States under the State Legislative List (Entry 51 of List II). If Article 301 stands in the way there is Article 305 to save it.

Appeal by Special Leave from the Judgment and Order, dated the 29th October, 1962, of the Orissa High Court in O J C No 241 of 1961

*Santosh Chatterjee and V D Misra*, Advocates, for Appellant

*N S Bindra*, Senior Advocate (*R N Sachthy*, Advocate, with him), for Respondents

*C B Agarwala*, Senior Advocate (*O P Rana*, Advocate, with him), for Intervener

The following judgments of the Court were delivered

*Shah, J* (for himself and on behalf of majority)—The appellants—Kalyani Stores—deal in liquor at Rourkela, District of Sundergarh in the State of Orissa. The appellants held a licence as retail vendors for "all types of foreign liquor" under the Bihar and Orissa Excise Act, 1915. The expression "foreign liquor" apparently includes Ale, Beer, Port, Cider and other fermented liquors, cordials, mixtures and other preparations containing spirit, perfumed spirit and all sorts of wines whether manufactured in India or abroad. Under the Bihar and Orissa Excise Act, 1915, by a notification issued in 1937 under section 27 a duty of Rs 40 per L.P. Gallon was imposed and realised by the State of Orissa on foreign liquor of Indian manufacture imported into State of Orissa from other parts of India. For the year 1st April, 1960 to 31st March, 1961, duty was levied on "foreign liquor" imported by the appellants at the rate fixed in the notification issued in 1937. On 31st March, 1961, in exercise of the powers conferred by section 90 of the Bihar and Orissa Excise Act II of 1915, the Board of Revenue enhanced the duty with effect from 1st April, 1961, in respect of "foreign liquors" from Rs 40 to Rs 70 per L.P. Gallon, and also raised duty in respect of other excisable articles. The licence held by the

II]

appellants was in due course renewed from 1st April, 1961 to 31st March, 1962. On 14th November, 1961, the Sub-Inspector of Excise, Panposh, called upon the appellants to pay the difference at the rate of Rs. 30 per L.P. Gallon in respect of the stocks of liquor found in the shop of the appellants on 1st April, 1961, and to pay duty at the rate of Rs. 70 per L.P. Gallon in respect of fresh stocks received after 1st April, 1961. The appellants challenged the legality of this levy by a petition under Article 226 of the Constitution filed before the High Court of Orissa. The appellants contended, *inter alia*, that the State could levy under section 27 of the Bihar and Orissa Act, duty on excisable articles produced or manufactured in the State and a countervailing duty on excisable articles imported into the State, imposed with a view to equalise the burden on the imported articles with the burden on manufactured articles in the State, but no countervailing duty on liquor imported could be levied if there was in the year of licence no liquor similar to the imported liquor manufactured within the State, and as there was no distillery in the State manufacturing "foreign liquor" the levy of countervailing duty was without authority of law. The High Court dismissed the petition holding that under Entry 51, List II, in Schedule VII of the Constitution, the State Legislature had the power to legislate for levying duties of excise on alcoholic liquors for human consumption manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India, and as it was admitted that the rate of duty on liquor produced in Orissa levied by the State of Orissa was identical with the countervailing duty required to be paid on imported liquor, the impugned notification was not invalid. With Special Leave granted by this Court, the appellants have appealed to this Court.

The Bihar and Orissa Excise Act (II of 1915) was enacted with the object, amongst others, to control the import, export, transport, manufacture, possession and sale of certain kinds of liquor and intoxicating drugs. Section 27 of the Act as amended by the Adaptation Order, 1950 provides:

"An excise duty or a countervailing duty, as the case may be, at such rate or rates as the State Government may direct, may be imposed, either generally or for any specified local area, on—

(a) any excisable article imported, or

*Explanation.—*

The appellants submit that the levy of duty at the rate of Rs. 70 per L.P. Gallon under the notification, dated 31st March, 1961, is without authority of law, in that it contravenes Entry 51, List II, Schedule VII of the Constitution. The argument presented in this laconic form is founded on what is contended is the true character of countervailing duties. We may observe that the challenge was restricted to the raising of the duty by the notification dated 31st March, 1961: the appellants did not challenge before the High Court the notification issued in 1937. The validity of the levy at the rate of Rs. 40 per L.P. Gallon before the Constitution is therefore not under consideration in this appeal. Power of the Legislature to legislate for imposition of duties on excisable articles manufactured within the State and to impose countervailing duties upon excisable articles imported into the State is not denied. It is said however that the expression "countervailing duty" means a duty levied on similar articles imported from outside the State, with a view to equalise the burden of taxation on articles produced or manufactured within the State and articles imported, and a countervailing duty on imported articles cannot be levied by the State unless articles similar to those imported are produced or manufactured in the State and an excise duty is levied thereon.

The High Court has observed in its judgment that it was admitted that the rate of duty on liquor produced in Orissa levied by the State Government was identical with the countervailing duty required to be paid on imported foreign

liquor Counsel for the appellants says that it was not admitted by the appellants that at the material time foreign liquor was manufactured or produced within the State of Orissa. The High Court has apparently not stated that "foreign liquor" was manufactured within the State of Orissa at the material time. From the affidavits filed in this Court by the parties it is clear that no "foreign liquor" was being produced in the State at the material time, nor was any such liquor produced at any time after the Constitution was brought into force. Counsel for the State has therefore very fairly not supported this part of the reasoning of the High Court.

This brings us to the consideration of the meaning of the expression 'countervailing duties' used in Entry 51, List II of the Seventh Schedule to the Constitution. The expression "countervailing duties" has not been defined in the Constitution or the Bihar and Orissa Act (II of 1915). We have therefore to depend upon its etymological sense and the context in which it has been used in Entry 51. In its etymological sense it means to counterbalance, to avail against with equal force or virtue, to compensate for something or serve as an equivalent of or substitute for. *see Black's Law Dictionary, 4th Edition page 421*. This would suggest that a countervailing duty is imposed for the purpose of counterbalancing or to avail against something with equal force or to compensate for something as an equivalent. Entry 51 in List II of the Seventh Schedule to the Constitution gives power to the State Legislature to impose duties of excise on alcoholic liquors for human consumption where the goods are manufactured or produced in the State. It also gives power to levy countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India. The fact that countervailing duties may be imposed at the same or lower rates suggests that they are meant to counter balance the duties of excise imposed on goods manufactured in the State. They may be imposed at the same rate as excise duties or at a lower rate, presumably to equalise the burden after taking into account the cost of transport from the place of manufacture to the taxing State. It seems therefore that countervailing duties are meant to equalise the burden on alcoholic liquors imported from outside the State and the burden placed by excise duties on alcoholic liquors manufactured or produced in the State. If no alcoholic liquors similar to those imported into the State are produced or manufactured, the right to impose counterbalancing duties of excise levied on the goods manufactured in the State will not arise. It may therefore be accepted that countervailing duties can only be levied if similar goods are actually produced or manufactured in the State on which excise duties are being levied.

But the Bihar and Orissa Act (II of 1915) was enacted by the appropriate Legislature in 1915 and by virtue of Article 372 of the Constitution it was a law in force and continues to remain in force until altered, repealed or amended by a competent legislature or by a competent authority, and therefore countervailing duty on imported foreign liquor could be levied by the State Government as it was levied before the Constitution, unless there is something to the contrary to be found therein. It is admitted that the Government of Orissa continued to levy a duty of Rs. 40 per L.P. Gallon under Act (II of 1915) even after Constitution came into force. By the notification of 1961 the duty was enhanced from Rs. 40 per L.P. Gallon to Rs. 70 per L.P. Gallon. Levy at the rate prescribed under the notification of 1937 in operation immediately before the Constitution remained effective until it was lawfully altered. The only contention raised in the High Court in support of the plea of invalidity of the levy in its entirety based on the nature of countervailing duty cannot prevail, for a part of the duty was already being lived before the constitution came into force and the appellants by their petition did not challenge in the High Court the validity of that levy before the 26th January, 1950. The duty of Rs. 70 per L.P. Gallon may be broken up into two parts, Rs. 40 per L.P. Gallon which was in force before the Constitution came into force, and which continued to be levied thereafter, and Rs. 30 which was the

added levy in 1961. The contention based on the nature of countervailing duty cannot in the face of Article 305, to which we shall presently refer prevail, in so far as it is levied under the notification issued in 1937, though the enhancement of Rs. 30 in 1961 after the Constitution came into force may be open to challenge. The argument of Counsel for the appellants that the levy of duty at the rate of Rs. 70 per L.P. Gallon in its entirety is invalid must therefore fail.

Whether the enhancement of the levy by notification, dated 31st March, 1961, insofar as it enhanced the levy from Rs. 40 to Rs. 70 per L.P. Gallon infringes any constitutional prohibitions may be considered. By section 27 of Act II of 1915 the State Government is given the power to impose a countervailing duty at the rate or rates as the State Government may direct. Before the Constitution, duty was imposed at the rate of Rs. 40 per L.P. Gallon on foreign liquors. The imposition remained in operation till the date on which the Constitution was brought into force, and has not been challenged in the petition. The Act merely authorised the levy of duty as may be fixed by the Government. To effectuate the power to levy the duty authorised, the rate of duty must be fixed by notification by the State Government. In 1937 the power was exercised by issuing a notification under section 27 authorising the levy of duty at the rate of Rs. 40 per L.P. Gallon. Section 27 of the Act authorised the imposition of excise and countervailing duties: the section however did not by its own force impose liability to pay any specific duties. To complete the levy the State Government had to issue a notification levying the duty and prescribing the rates thereof. By the notification, dated 31st March, 1961, that law was altered and the duty was raised to Rs. 70 per L.P. Gallon. Till the enactment of the Constitution the existing law relating to the levy of countervailing duty on excisable articles was contained in section 27 supplemented by the notification issued by the Government of Orissa in 1937. By the notification, dated 31st March, 1961, the rate of levy was altered, and the validity of the altered rate of duty has to be adjudged in the light of the provisions of the Constitution.

The validity of the imposition of the new rate of Rs. 70 per L.P. Gallon may be examined in the light of the restrictions imposed by the Constitution on the legislative power. By Article 301 of the Constitution, subject to the other provisions of Part XIII, trade, commerce, and intercourse throughout the territory of India is to be free. By Article 303 no power is conferred upon the State Legislature to make any law giving, or to authorise the giving of, any preference to one State over another, or to make, or authorise the making of, any discrimination between one State and another, by virtue of any entry relating to trade and commerce in any of the List in the Seventh Schedule. The material part of Article 304 is as follows:

"Notwithstanding anything in Article 301 or Article 303, the Legislature of a State may by law—

(a) impose on goods imported from other States or the Union territories any tax to which similar goods manufactured or produced in that State are subject, so however, as not to discriminate between goods so imported and goods so manufactured or produced; and

(b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest:

Provided that \* \* \* \* \*

Article 305, insofar as it is material, provides:

"Nothing in Articles 301 and 303 shall affect the provisions of any existing law except in so far as the President may by order otherwise direct; \* \* \* \* \*

Article 304 is in terms prospective: it authorises the State Government to legislate notwithstanding anything in Article 301 or 303 to impose on goods imported from other States any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods imported and goods manufactured or produced or to impose such reason

able restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest. The notification levying duty at the enhanced rate is purely a fiscal measure and cannot be said to be a reasonable restriction on the freedom of trade in the public interest. Article 301 has declared freedom of trade, commerce and intercourse throughout the territory of India and restrictions on that freedom may only be justified if it falls within Article 304. Reasonableness of the restriction would have to be adjudged in the light of the purpose for which the restriction is imposed, that is 'as may be required in the public interest'. Without entering upon an exhaustive categorization of what may be deemed 'required in the public interest', it may be said that restrictions which may validly be imposed under Article 304 (b) are those which seek to protect public health, safety, morals and property within the territory. Exercise of the power under Article 304 (a) can only be effective if the tax or duty imposed on goods imported from other States and the Tax or duty imposed on similar goods manufactured or produced in that State are such that there is no discrimination against imported goods. As no foreign liquor is produced or manufactured in the State of Orissa the power to legislate given by Article 304 is not available and the restriction which is declared on the freedom of trade commerce or intercourse by Article 301 of the Constitution remains unfettered.

Mr Bindra appearing on behalf of the State of Orissa contended that the Legislature having empowered the State Government by section 27 to levy duty at a rate which may be prescribed the notification, dated 31st March, 1961, enhancing the tax derived its validity from the Act itself and did not amount to any law modifying the existing law. Therefore, it was said, the levy of duty at the enhanced rate was supported by the power conferred by section 27 which was "existing law". This argument cannot in our view, be sustained. By Article 366 (10) unless the context otherwise requires, the expression "existing law" means any law, Ordinance, order, bye law, rule or regulation passed or made before the commencement of the Constitution by any Legislature, authority or person having power to make such a law, Ordinance, order, bye law, rule or regulation. Existing law within the meaning of Article 305 was therefore the provision contained in section 27 of the Bihar and Orissa Act II of 1915 authorising the State Government to issue a notification imposing a duty at the rate fixed thereby and the notification issued pursuant thereto before the Constitution. The notification of 31st March, 1961, which imposed an additional burden may therefore be valid only if it complies with the constitutional requirements.

The decision in *The Bangalore Woollen, Cotton and Silk Mills Company Ltd., Bangalore and another v The Corporation of the City of Bangalore*<sup>1</sup> on which reliance was placed by Mr Bindra does not assist his contention. In that case by resolution dated 31st March, 1954, the Municipal Corporation of Bangalore purporting to act under the authority conferred by section 98 of the City of Bangalore Municipal Corporation Act LXIX of 1949 resolved to levy octroi duty on cotton and wool. The authority of the Municipal Corporation to levy the tax was challenged. It was held by a Division Bench of this Court in *Bangalore Woollen Cotton and Silk Mills v Bangalore Corporation*<sup>2</sup> that the Legislature had laid down the powers of the Municipal Corporation to tax animals and goods, brought within the octroi limits and had enumerated certain articles and animals in Part V of Schedule III and by class VIII read with section 97 had authorised the Corporation to impose a tax on other articles or goods. This power in the view of the Court was granted by conditional legislation and was not liable to be struck down on the score of excessive delegation. The question whether the imposition of the octroi duty offended Articles 276 and 301 was then referred to a larger Bench and the Court held in *The Bangalore Woollen Cotton and Silk Mills*

<sup>1</sup> (1962) 1 S.C.J. 214 (1961) 3 S.C.R. 707      <sup>2</sup> (1961) 3 S.C.R. 698 A.I.R. 1962 S.C. 1263  
A.I.R. 1962 S.C. 562

*Co. Ltd., Bangalore's case*<sup>1</sup> that the combined effect of sections 97 and 130 and Part V of Schedule III including class VIII is that the words of a general nature used by the Legislature had the same effect as if all articles were intended to be included, and the impugned octroi duty did not contravene the provisions of Articles 276 and 301 of the Constitution. It was urged on behalf of the taxpayers that the source of the authority to levy octroi duty on cotton and wool was the resolution of the Municipal Corporation, which was in the nature of subordinate legislation, which amended or altered the existing law. This contention was rejected. The Court in that case held that the combined effect of sections 97, 130 and Part V of Schedule III including class VIII in the City of Bangalore Municipal Corporation Act was that all articles were intended to be included in the parent statute. It is implicit in the reasoning that there was no alteration or modification of the existing law, by the resolution of the Corporation. The decision of that case turned entirely upon the interpretation of the special provisions the like of which are not found in the Bihar and Orissa Act (II of 1915).

In the present case, it is clear that under the existing law duty had been imposed in exercise of the power contained in sections 27, 28 and 90 of the Act and the notifications issued from time to time before the Constitution was enacted, and that law was altered by the notification, dated 31st March, 1961. It is not the case of the State that in exercise of any pre-existing conditional legislation, duty at enhanced rate was made leviable on foreign liquor. The sole authority for the levy of the duty at the enhanced rate is the notification of the State Government, dated 31st March, 1961. That notification infringes the guarantee of freedom under Article 301, and may be saved only if it falls within the exceptions contained in Articles 302, 303 and 304. Articles 302 and 303 are apparently not attracted and have not been relied upon, and the notification does not comply with the requirements of the Constitution contained in Article 304, clauses (a) and (b). The notification, dated 31st March, 1961, enhancing the levy by Rs. 30 per L.P. Gallon must therefore be regarded as invalid. That however does not affect the validity and the enforceability of the earlier notification issued in 1937 which must remain operative in view of Article 305. That Article specifically protects existing law and as the levy of countervailing duty at Rs. 40 per L.P. Gallon was an existing law it is protected under Article 305. In fact this position was not challenged by the appellants in their writ petition.

The appeal is therefore partially allowed, and it is declared that the notification, dated 31st March, 1961, enhancing duty on foreign liquor at the rate of Rs. 30 per L.P. Gallon is invalid as offending Article 304 of the Constitution and is therefore unenforceable. The right of the State to enforce the liability against the appellants to pay duty at the rate prescribed in the earlier notification which held the field, remains however unaffected. In view of the divided success of the parties, there will be no order as to costs in this Court and the High Court.

*Hidayatullah, J. (dissenting)*—The appellant is a firm which deals in liquor at Rourkela in the Orissa State. It challenges *in toto* the imposition of a duty of excise on foreign liquor levied at first at Rs. 40 per London proof gallon and from 1st April, 1961, at Rs. 70 under section 27 of the Bihar and Orissa Excise Act, 1915. The original duty at Rs. 40 was fixed by a notification issued in 1937 and it was enhanced by a notification issued on 31st March, 1961. The appellant on being asked to pay the difference in respect of stocks held in its shop filed a petition under Article 226 of the Constitution challenging the enhancement of the duty as well as the duty at the original rate.

Section 27 of the Bihar and Orissa Act (II of 1915), for our purpose, reads as follows:

1. (1962) 1 S.C.J. 214; (1961) 3 S.C.R. 707; A.I.R. 1962 S.C. 562.

\* 27 Power to impose duty on import, export, transport and manufacture—(t) An excise duty or a countervailing duty as the case may be at such rate or rates as the State Government may direct may be imposed either generally or for any specified local area on—

- (a) any excisable article imported or
- (b) any excisable article exported, or
- (c) any excisable article transported or
- (d) any excisable article (other than *tariff*) manufactured under any license granted in respect of clause (a) of section 13 or

(e) \* \* \*

(f) any excisable article manufactured in any distillery or brewery licensed established authorized or continued under this Act

Explanation—

(2) \* \* \*

(3) Notwithstanding anything contained in sub section (1),—

(i) duty shall not be imposed thereunder on any article which has been imported into (India) and was liable on such importation to duty under the Indian Tariff Act 1894 or the Sea Customs Act 1878 if—

(a) the duty as aforesaid has been already paid, or

(b) a bond has been executed for the payment of such duty

The argument is that since foreign liquor is not manufactured in the State of Orissa and no duty of excise as such can be levied on locally manufactured foreign liquor, a countervailing duty cannot be charged on foreign liquor brought from an extra State point in India. It is also contended that this impost offends Articles 301, 303 and 304 of the Constitution and is a colourable piece of legislation because countervailing duties of excise can only be levied when corresponding products can be subjected to an equal or more excise duty. It is submitted that the whole of the duty must fail as contrary to the intendment of the Constitution. It is also argued that even if the original countervailing duty at the rate of Rs 40 per London proof gallon could be said to be leviable by virtue of Articles 305 and 372 of the Constitution which preserve existing laws or the laws in force, the enhancement of the existing duty makes the imposition a new tax and such notification cannot be made if there is no possibility of the levy of corresponding duty on locally manufactured goods of the same kind.

The Constitution divides the subject of duties of excise of between the Union and the States. What the division is may be seen by comparing Entry 84 of List I with Entry 51 of List II.

#### Entry 84 of List I

Duties of excise on tobacco and other goods manufactured or produced in India except—

- (a) alcoholic liquors for human consumption
- (b) opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in sub paragraph (b) of this entry

#### Entry 51 of List II

Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India—

- alcoholic liquors for human consumption,
- (b) opium, Indian hemp and other narcotic drugs and narcotics, but not including medicinal and toilet preparations containing alcohol or any substance included in sub paragraph (b) of this entry

It is to be noticed that the power to levy duties of excise on alcoholic liquors for human consumption, with which we are presently concerned, is given to the States. Entry 51 goes a little further and allows the levy of countervailing duties at the same or at lower rates on similar goods manufactured or produced elsewhere in India. A duty of excise is a tax on production and as the Legislatures of the States are not authorized to legislate beyond the States such duty can only be levied in respect of goods produced within the State. The Entry, however, allows the State to levy a countervailing duty at the same or a lower rate on goods produced or manufactured in India and brought into the State from outside. Three questions arise. First there is the general question: must the countervailing duty be only imposed on imported articles when articles similar to those are produced or manufactured within the State on which excise duty is levied? If the answer to this question is in the negative there is an end to all dispute for then the old law, the old notification and new notification must be above reproach. The next two questions are narrower than the first. They are: (a) was the imposition and collection of the countervailing duty at Rs. 40 per London proof gallon valid and (b) is the notification enhancing the duty of excise and the countervailing duty to Rs. 70 per London proof gallon beyond the powers of the State Government?

A countervailing duty is not defined in the Act. In the Concise Oxford Dictionary "countervailing duty" is stated to be:

"a countervailing duty—one put on imports that are bounty-fed to give home goods an equal chance".

This brings out the true character of a countervailing duty. It is imposed to make incidence of excise duty equal. How these countervailing duties came to exist in India is a matter on which something may be said before the challenge to the legality of the imposition may be considered.

The Bihar and Orissa Excise Act was passed on 19th January, 1916. It was thus passed under the Government of India Act, 1915. Section 27 as originally passed opened with the words "A duty at such rate or rates...." instead of the words "An excise duty or a countervailing duty as the case may be at such rate or rates...." which are now to be found there. The original Act made no difference between excisable articles manufactured locally and those imported into the Province. The clauses of section 27 which have retained their original form and which have been quoted by me above, when read with the former opening words clearly indicate this. In the Devolution Rules (Part II dealing with the Provincial subjects) under the Government of India Act, Item 16 read as follows:

"16. Excise, that is to say, the control of production, manufacture, possession, transport, purchase and sale of alcoholic liquor and intoxicating drugs, and the levying of excise duties and licence fees on or in relation to such articles, but excluding, in the case of opium, control of cultivation, manufacture and sale for export."

This may be compared with preamble to the Bihar and Orissa Excise Act, 1915, as it originally stood.

"Whereas it is expedient to amend and re-enact the law in the Province of Bihar and Orissa relating to the import, export, transport, manufacture, possession, and sale of certain kinds of liquor and intoxicating drugs;

And whereas the previous sanction of the Governor-General has been obtained, under section 5 of the Indian Councils Act, 1892, to the passing of this Act;

It is hereby enacted as follows:—"

The word "excise" was also given the same wide meaning in Entry 16. It included not only the control of production but also the control of purchase and sale of alcoholic liquor and the levying of excise duty in relation to the articles without indicating the place of their manufacture, that is to say, that they should be manufactured within the Province.



When the Government of India Act, 1935, was in the process of being drafted the White Paper proposals introduced a new scheme for division of resources available under the head of excise duties. It was recommended that the federating units should be allotted a share of the yield of excise duty on goods produced, other than those specifically assigned to the Provinces. This was given effect to by including in the Government of India Act, 1935, two entries which were Entry No. 45 of List I (which corresponded to Entry 84 of List I of the present Constitution) and Entry 40 in List II (which corresponded to Entry 51 of List II of the present Constitution). When the Government of India Act, 1935 was passed it was possible for the first time to impose countervailing duties. The intention was that taxation in the matter of excisable goods should be uniform in India and one Province should not try to take advantage of another Province by exporting excise free goods, thus making them bounty fed. By this means duties of excise on all goods of the same kind could be kept uniform. But the Excise Acts in India, including the Bihar and Orissa Act, were not harmonious with the constitutional provision. They made no distinction between duties of excise levied on goods produced locally and duties of excise levied on goods which were imported into or transported within the Province. They would have, after the enactment of the Government of India Act, 1935 been rendered *ultra vires* if the duty was unequal in such a way as to make it more on imported goods unless they were amended suitably. Instead of amending them by the ordinary legislative process which would have been cumbersome and slow, recourse was taken to the power to adapt laws given by section 293 of the Government of India Act, 1935. It provided —

"293 *Adaptation of existing Indian laws etc*—His Majesty may by Order in Council to be made at any time after the passing of this Act provide that as from such date as may be specified in the Order, any law in force in British India or in any part of British India shall until repealed or amended by a competent Legislature or other competent authority, have effect subject to such adaptations and modifications as appear to His Majesty to be necessary or expedient for bringing the provisions of that law into accord with the provisions thereof which reconstitute under different names Governments and authorities in India and prescribe the distribution of legislative and executive powers between the Federation and the Provinces.

Provided that no such law as aforesaid shall be made applicable to any Federated State by an Order in Council made under this section.

In this section the expression "law" does not include an Act of Parliament, but includes any ordinance, order, bye-law, rule or regulation having in British India the force of law."

Thus by an Order-in-Council, which was called the Government of India (Adaptation of Indian Laws) Order, 1937, section 27 of the Bihar and Orissa Excise Act was adapted to read as we find it today. The opening words were altered to mention countervailing duties also. This adaptation was made not only in the Bihar and Orissa Act but every Excise and Ahkari Act in the rest of India and was intended to bring all Excise Acts into accord with the distribution of legislative powers as indicated in section 293. In all those Acts, previously a duty was leviable not only on excisable goods produced in the Province but also imported from outside. The duties could be at different rates. After the Adaptation of Laws Order the duty was leviable on excisable goods but a countervailing duty at the same or lower rates was leviable on goods imported from outside. The duties of excise on imported goods became countervailing duties. The adaptation was effective as a valid law beyond the challenge of Courts by virtue of clause (3) of the order which read

"3 The Indian laws mentioned in the Schedule to this Order shall until repealed or amended by a competent Legislature or other competent authority have effect subject to the adaptations and modifications directed by those Schedules to be made therein or, if it is so directed, shall cease to have effect."

Where, therefore, the rate of duty on imported goods was more than the rate of duty on the locally produced goods the duty was *pro tanto* cut down. The Adaptation of Laws Order came into force on 1st April, 1937, when Part II of the

Government of India Act, 1935, commenced and the notification imposing uniform excise and countervailing duties was then issued. The same Act has continued till today and although the Government of India Act, 1935, is repealed the scheme of division of excise duties is today the same as it was under that Act.

Now the argument is that the Bihar and Orissa Act is affected by the Entries and by the fact that there is no foreign liquor manufactured in the State. Historically the Bihar and Orissa Act continued to have force and effect by the authority of the Government of India Act, 1935, the Order-in-Council and the Adaptation of Laws Order. The existence of countervailing duty was not made dependent upon the manufacture of foreign liquor in the State. The Bihar and Orissa Act which provided for countervailing duty in anticipation of the production in the State was valid because it had force and effect by the combined operation of these provisions.

The Constitution today permits the levy of excise duty on locally produced excisable goods as well as countervailing duties on excisable goods produced outside the State and brought into the State. Existing Laws are preserved by Article 372 which reads:

"372. *Continuance in force of existing laws and their adaptation:*

(1) Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.

(2) For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any Court of law.

(3) Nothing in clause (2) shall be deemed—

(a) to empower the President to make any adaptation or modification of any law after the expiration of three years from the commencement of this Constitution ; or

(b) to prevent any competent Legislature or other competent authority from repealing or amending any law adapted or modified by the President under the said clause."

As the Bihar and Orissa Act continues to be valid it authorises that excisable goods produced in the State will bear countervailing duty. The two duties are not the same and countervailing duties are not conditioned by the manufacture of the goods of the same kind in the State. It is not stated that duties on foreign liquor brought into the States cannot be placed under the present Act simply because goods of the same kind are not produced in the State.

The history of legislation shows that adaptation was sufficient to bring the Bihar and Orissa Act in line with the requirements of the Constitution Act of 1935. The adaptation made the Act valid *vis-a-vis* the Government of India Act, 1935. When the Act was valid, the notification issued in 1937 was also valid. The Excise Acts, as adapted, continued to be law under the Government of India Act, 1935. The present Constitution has made no change either in the distribution of legislative power or the entries and has further said in Article 372 that all existing laws continue to be of full force and effect. The imposition of countervailing duty at Rs. 40 per London proof gallon continued to be valid.

The next question is whether the original duty alone would be sustained or also the enhanced duty which was introduced in 1961. In my judgment, if the old duty at the old rate is sustainable there is no reason why the absence of production of foreign liquor in the State would make any difference to the enhancement of the duty to Rs. 70 per London proof gallon. So long as the Act is valid, and that is beyond doubt, the notification can be changed. The

duty could always be made less and there is no reason why it could not be made more provided the imposition of duty on locally produced goods was not made lower. If production of foreign liquor is not a condition precedent to the validity of the Act because of historical reasons there is no bar to the validity of the notification which takes its force from the valid Act. The Constitution preserved certain taxes by Article 276. There the rate or incidence of the tax could not be changed for every change made the tax a new tax. This is not the case under Article 372 which upholds the Act. The notification takes its validity from the Act.

I have attempted to show that the Act was valid under the Government of India Act, 1935, because the Adaptation of Laws Order could not be questioned in a Court of law and by reason of Article 372 the Act must be deemed to be valid even today. The absence of manufacture of foreign liquor in the State thus makes no difference to the validity of the duty imposed and it can make no difference to the duty if reduced or increased by notification so long as it is not more than duty on locally produced goods. I do not, therefore, find it necessary to say whether countervailing duties can only be imposed on imported articles when articles similar to those are produced or manufactured within the State on which ordinary excise duty is levied. That question I leave open because the Act being valid for other reasons, it is hardly necessary to decide the larger issue.

Finally, I find it sufficient to say that Article 301 or 304 (a) cannot come into play. These Articles read

*" 301 Freedom of trade, commerce and intercourse —*

Subject to the other provisions of this Part trade, commerce and intercourse throughout the territory of India shall be free."

*" 304 Restrictions on trade, commerce and intercourse among States —*

Notwithstanding anything in Article 301 or Article 303 the Legislature of a State may by law—

(a) impose on goods imported from other States any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced; and

(b) . . . . .

I fail to see what Article 304 (a) has to do with this matter. Article 304 (a) imposes no ban but lifts the ban imposed by Articles 301 and 303 subject to one condition. That article is enabling and prospective. It is available in respect of other taxes such as sales tax etc imposed by the State Legislature. In the matter of excise duties the State Legislature has competence even apart from Article 304 (a) because the power to impose duties of excise on alcoholic liquors for human consumption produced in the State and countervailing duties on similar liquors produced outside the State in India is already conferred by the legislative list. The Bihar and Orissa Excise Act does not stand in need of support from Article 304 (a). If Article 301 stands in the way there is Article 305 which read previously

" 305 Nothing in Articles 301 and 303 shall affect the provisions of any existing law except in so far as the President may by order otherwise provide."

The amendment of Article 305 by the Constitution (Fourth amendment) Act, 1955, does not alter the net position. The President has not made any order and so Articles 301 and 303 do not apply. Article 304 (a) is an exception to Articles 301 and 303 and is not needed here in view of the power in the State Legislature by Entry 51 of List II. The Bihar and Orissa Act is therefore, sustained by Articles 305 and 372 independently of Article 304 (a).

I am, therefore, of opinion that section 27 of the Bihar and Orissa Excise Act, 1915 was and is a valid enactment. At no time since it was enacted, could it be challenged and it cannot be challenged today. I do not think that the law

II]

which is saved is a combination of the Act and the notification. Existing law is defined to include a law and each law viewed separately is saved. The Bihar and Orissa Act (particularly section 27) is a law and it is saved by itself. What was done under its authority in the past and what is being done today is equally valid. The notification of 1961 derives its force from section 27, which is a valid enactment even as the notification of 1937 did before from the same section, and the new notification cannot be said to run against any constitutional provision. If the duty at Rs. 40 can be sustained the duty at Rs. 70 must also be valid, for the same reasons apply. I would, therefore, dismiss the appeal with costs.

*Order of the Court.*—In accordance with the opinion of the majority, this appeal is partially allowed. There will be no order as to costs in this Court and the High Court.

K.G.S.

*Appeal allowed in part.*

## THE SUPREME COURT OF INDIA. (Civil Appellate Jurisdiction.)

PRESENT:—A. K. SARKAR, RAGHUBAR DAYAL AND V. RAMASWAMI, JJ.  
Mongibai Hariram and another

.. Appellants\*

v.

The State of Maharashtra and another

.. Respondents.

*Bombay Land Requisition Act (XXXIII of 1948), sections 4 (3) and 6—Bombay Rents, Hotels and Lodging Houses Act (LVII of 1947), sections 13 (1) (g) and 17—Person evicted in execution of a decree for ejectment under the Act of 1947—Requisition of the same premises under the Act of 1948—Allotment to the evicted person—Legality.*

The appellant-trustees evicted one K. A. from room No. 26 on the second floor of the Kutchi House in execution of a decree for ejectment under the Bombay Act LVII of 1947 obtained on the following grounds: (i) that the tenant P. S. has sub-let and/or assigned his interests to K. A. without the permission of the appellants; (ii) that P. S. has been in arrears of rent; and (iii) that the appellants required the premises for their own use *bona fide* and reasonably. The decree for eviction was passed *ex parte* on 5th August, 1958; no reasons were given in the order. After the termination of obstruction proceedings etc., possession was taken on 30th April, 1959. Immediately thereafter K. A. informed the Accommodation Officer of the vacancy of the premises and applied to him for requisition of the same under the Land Requisition Act of 1948 and for allotment to him of the said premises; the same was done. Appeals to the Government were of no avail.

The appellants, therefore, filed a writ petition in the High Court of Bombay for quashing the orders of requisition and allotment which was dismissed by a single Judge and on appeal by the Bench. On appeal to the Supreme Court by Special Leave against the order of dismissal,

*Held:* (By the Court) The words "let or intended to be let separately", in section 4 (3) of the Land Requisition Act qualifies only 'part of a building' and that part of a building if let or intended to be let separately on the date of enforcement of that Act is 'premises', within the meaning of the term under the Act.

Per Raghubar Dayal, J. (for himself and Ramaswami, J.) The premises (Room No. 26) became vacant, on the tenant ceasing to occupy due to eviction in execution of the decree for ejectment. The fact that the appellants secured the eviction, on the ground *inter alia*, that they required it for their own use does not affect the question of the premises becoming vacant on 30th April, 1958 liable to be proceeded with under section 6 of the Act of 1948. It is not also open to the appellant after the declaration under section 6 (1) to question the existence of vacancy.

25th October, 1965.

The circumstances that K A illegally occupied room No 26, or that P S ceased to occupy the same and had not paid the rent (which justified the decree for eviction under the Bombay Act of 1947 or that various steps were taken to delay the execution of the decree for ejectment do not, in law, make the requisition order *mala fide*, that order was not made because of any animus against the appellants or for a purpose for which requisition could not be made.

Allotment to a homeless person is a public purpose. It may not appear very right, on grounds of sentiment and propriety that a tenant, who has behaved badly towards a landlord, be allotted the same premises after he had been evicted in execution of a decree of Court of law. But allotment to such a person is not against law, for, in pursuance of the practice obtaining, the allotment was made to K A the first informant of the vacancy.

No occasion arose in the ejectment suit for the Court to determine whether greater hardship would be caused to the landlord as the suit was uncontested. There seems to be no good reason why the needs of the landlord be not deemed to be subservient to the requirements of public purpose as judged by the State Government.

If the 1948 Act by section 6 provides that the landlord cannot occupy the premises rendered vacant on the eviction of the tenant within a month of the notice to State Government of the vacancy there is no conflict between that provision and the discretionary power under section 17 of the 1947 Act.

Further K A is not a party to these proceedings and this also would prove fatal to the petition by the appellants who seek to quash the order of allotment to him.

Per Sarkar, J (contra). The requisition made in this case was not for a public purpose contemplated by the Act nor was the power of requisition intended to be exercised in the circumstances of the case. In a legal sense there has been a *mala fide* use of the power conferred by the Act.

The omission of the Court to state the reasons in its order for ejectment would not show that it was not passed on the ground of the *bona fide* personal requirement of the premises by the landlord. It cannot be that the power under the Requisition Act was intended to annul the decision under the Rent Act and restore the possession to an evicted person—one who knew that rents had not been paid and that he was occupying the premises free. The requisitioning authorities fully aware of the facts of the litigation completely misconceived their powers under the Requisitioning Act.

To give the Requisitioning Act preference over the Rent Act would be to hold that a general statute overrides a special one. The present is precisely a case of that kind.

Appeal by Special Leave from the Judgment and Order, dated the 13th/14th September, 1960, of the Maharashtra High Court in Appeal No 14 of 1960.

A V Viswanatha Sastri, Senior Advocate, (B R Agarkala, Advocate, and H K Puri, Advocate, for *M/s Gagrut & Co.*, with him), for Appellants.

Purushottam Trikumdas, Senior Advocate, (B R G K Achar, Advocate, for R. H. Dhebar, Advocate, with him), for Respondents.

The Court delivered the following judgments —

Sarkar, J.—The appellants are trustees of a certain trust which owns a big block of buildings situate at Matunga in the city of Bombay. The rooms in this block of buildings are let out to various tenants. One P S Nambiar was a tenant of room No 26 in this block for a long time. He had left the room without informing the appellants and having put one K A Nambiar in possession. It is not known when P S Nambiar left. The appellants never accepted K A Nambiar or any one else as the tenant. No rent had been paid in respect of the room since 1st January, 1956, which was prior thereto being paid in the name of P S Nambiar.

The appellants terminated the tenancy of P S Nambiar by a notice to quit, expiring on 31st December, 1957, and thereafter on 26th March, 1958, filed a suit in the Court of Small Causes, Bombay, against P. S. Nambiar and K. A. Nambiar.

for recovery of possession of the room, P. S. Nambiar being sued as the tenant and K. A. Nambiar as the person in occupation of the room. The grounds on which ejectment was sought were that (1) P. S. Nambiar had sublet the room without the permission of the appellants, (2) he had been in arrears with his rent from 1st January, 1956 and (3) the premises were required by the appellants for their own use and occupation. On proof of any of these grounds an ejectment decree could be passed against the tenant under the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, hereafter referred to as the Rent Act. The defendants could not be personally served and eventually service of the summons was effected by affixing it on the room. That was due service of the summons but the defendants did not enter appearance to the suit. Evidence was led on behalf of the appellants to prove that the rents were in arrear as stated and that they required the room reasonably and *bona fide* for their own use and occupation as such trustees. No evidence appears to have been led as to any subletting by P. S. Nambiar. So this ground of eviction may be left out of consideration.

An *ex parte* decree in ejectment was passed in the suit on 18th August, 1958. The execution of that decree was obstructed in various ways including an application by K. A. Nambiar to set aside the decree on the ground of non-service of summons which was dismissed by the trial Court and an appeal from that order also failed. Eventually the appellants obtained possession of the room on 30th April, 1959. On next day, that is, 1st May, 1959, K. A. Nambiar wrote to the Controller of Accommodation appointed under the Bombay Land Requisition Act, 1948, stating that he was evicted from the room in execution of a decree and requesting that the room be requisitioned and allotted to him under the Requisition Act as he had no other accommodation. Thereafter, by a notice dated 11th July, 1959, the appellants were called upon to show cause why the room should not be requisitioned under the Act and after certain enquiries had been made, an order was passed on 10th September, 1959, declaring the room to be vacant and requisitioning it and by another order, dated the same day, it was allotted to K. A. Nambiar. The appellants took certain steps under the Requisition Act in the nature of an appeal to have these orders annulled but their attempts were unsuccessful.

On 30th September, 1959, the appellants moved the High Court at Bombay under Article 226 of the Constitution for a writ directing the State of Bombay and the Accommodation Officer appointed under the Requisition Act to withdraw the orders of requisition and allotment and also for a writ quashing these orders. The petition was heard by a learned Single Judge of the High Court who dismissed it. The appellants then went up to a Division Bench in appeal against the judgment of the learned single Judge but in this appeal also they were unsuccessful. They have now appealed to this Court with Special Leave.

On behalf of the appellants it was pointed out that the premises which could be requisitioned under the Act were defined as any "building or part of a building let or intended to be let separately". It was said that where a building or a part of it was not intended to be let, it would not be premises and the intention to let had to be determined at the date of the order of requisition. It was, therefore, contended that as the appellants had obtained an ejectment decree on the ground that they wanted to occupy the room themselves, they did not intend to let it out and so, in the absence of such intention at the date of requisition, the room was not premises within the Act and could not be requisitioned. According to the appellants the order of requisition was hence bad. This argument does not seem to me to be well founded. The words "let or intended to be let separately" are only applicable to a part of a building for there is no question of a whole building being let separately; a whole building is not joint with anything else separately from which it can be let. That being so, it seems to me that the words "let or intended to be let" were used only

to indicate that a part of a building is not to be understood as premises capable of being requisitioned unless the landlord let it or intended to let it separately from the rest which might be in his occupation. The reason for treating a part of the building in this way was apparently that that it would cause hardship to a landlord to force him to accept in a part of his house a stranger as a tenant. A part of building was considered by the statute to be fit for requisition only when the landlord had out of his free choice let it separately from the rest or intended so to let it. Such a view would be understandable for in such a case there would be no question of any hardship on him.

The words "intended to be let" did not, in my view, therefore refer to any intention to let actually existing at the time of the requisition. They had been used to indicate that a part of a building which had never been let before would not be premises within the Act unless the lessor had intended to let it separately at any time. It would not be taking an unreasonable view to hold that if it is once proved that the landlord had at any time intended to let a part separately, it would for all time to come be premises within the Act, for if once the landlord had wanted to let out the part, the letting could not cause any hardship to him. If the Act thereafter did not take any notice of any change in the landlord's mind regarding the letting of a part, that would only mean that it did not think it right to give him the luxury of changing his mind from time to time. That does not seem to me to be an unnatural interpretation of the Act.

Again, the definition does not say that the building or a part of it must have been intended to be let at the date of the requisition. I find no justification either in the context or the intendment of the Act to warrant the addition of words to that definition to support the appellant's contention. Furthermore, if the words "intended to be let" were meant to refer to an intention at the time of requisition, it had also to be held that the word "let" meant that the premises to be requisitioned were let at the time of requisition. That would, of course, be absurd for what could be requisitioned under the Act was what was not let and not occupied by a landlord or a tenant, namely, vacant premises. I am, therefore, unable to agree that the room was not "premises" within the definition of that word in the Act. The order of requisition is not open to challenge on the ground that it related to premises as defined in the Act.

That however does not, in my opinion, conclude the matter. I confess that this case has caused me great anxiety but having given it the utmost thought that I could, I have not been able to persuade myself that the orders that were made in this case can be sustained. I think that though they may be within the letter of the Act, they are not within its spirit or intendment. In my view, the requisition made in this case was not for a public purpose contemplated by the Act nor was the power of requisition conferred by the Act intended to be exercised in the circumstances that prevailed. There has been in a legal sense, a *mala fide* use of the powers conferred by it. I proceed to set out the reasons which have led me to this view. I should state here that this aspect of the matter had not been presented to the High Court for its consideration.

Under the Act premises could be requisitioned only for a public purpose. Public purpose would no doubt include the purpose of finding a shelter for a homeless person. This has indeed been held by this Court in *The State of Bombay v. Bhanji Munji*<sup>1</sup>. A person evicted from a premises in his occupation may be a homeless person. Now in the present case the requisition had been made for K. A. Nambiar. He had no doubt been evicted from the premises in question. I will assume he had no other home in which he could take shelter and that he was a homeless person. But the question still remains whether he was a homeless person within the contemplation of the Act, that is, whether his requirement was a public purpose within the Act. I do not think he was.

I] Now section 13 (1) (g) of the Rent Act provides that an order for eviction from premises may be made against a tenant where the landlord requires them reasonably and *bona fide* for his own occupation. Section 12 of this Act provides for eviction for non-payment of rent. As I have said earlier, the appellants had asked for eviction on both these grounds and had given evidence in support of them. It is not necessary to consider the ground of non-payment of rent for the purposes of this judgment for it does not annul the other ground of eviction and does not affect the order of eviction made under section 13 (1) (g). With regard to section 13 (1) (g) the appellant's case was that they required possession of the room for storing building materials of the trust and also for their occupation when they came from Calcutta where they resided to Bombay to look after the properties of the trust of which they were trustees as they had no residential accommodation in Bombay. It has not been disputed that this, if proved, would satisfy section 13 (1) (g). They gave evidence to prove this requirement. This they repeatedly stated in their affidavits and it has not been denied by the respondents. That evidence was unchallenged, as it must be held in view of the proceedings in the ejectment suit earlier referred to, that the tenant and occupier had deliberately kept away from the hearing of the ejectment suit. It follows, therefore, that the ejectment must have been ordered also on the ground that the appellants wanted the room for their occupation. It is true that there was no judgment in the ejectment suit but only an order for ejectment without stating the reasons on which it was based but that cannot affect the rights of the appellants. The omission of the Court to state the reasons for its order would not show that the order had not been passed on the ground of the *bona fide* personal requirement of the premises by the landlord.

The result of this order is that the Court acting under the Rent Act found after due trial that the appellants were also homeless persons and between them and the defendants they had a greater right to occupy the room: see section 13 (2). The result of the requisition order was to annul this decision. It does not seem to me that powers under the Requisition Act were intended to be exercised to set at naught the judgment of a Court and restore possession to the evicted tenant. In my opinion, in the circumstances prevailing, the premises could not be requisitioned at all for if they were requisitioned even for putting a third person in possession the result might be that the evicted tenant rendered homeless for no fault of his own would have to go without a shelter while the third person to whom the premises were allotted was provided with a home. It would be unnatural to think that the Act intended such an anomalous situation. I, therefore, think that the requisition order was outside the Act and invalid.

This view finds some support from the judgment of the Appellate Bench of the High Court. It was there said that if the premises had been allotted to K. A. Nambiar though he was in arrears with the rent and for that reason evicted, then it would have to be held that the orders of requisition and allotment "were not free from *mala fide*." The learned Judges however held that K. A. Nambiar had no liability for rent as he was not the tenant, that liability being only that of P. S. Nambiar who was the tenant, and, therefore, the orders could not be said to have been made *mala fide*. With respect, I am unable to see what difference the fact that K. A. Nambiar was not liable for rent and could not be said to have been evicted for non-payment of rent by him, made. Admittedly, he was in occupation of the premises all along. He knew that rents had not been paid and that he was occupying the premises free. Is not that fact as strong to show *mala fides* as the fact, if it had been so, that he was liable to pay rent and did not pay? It seems to me impossible that the Act contemplated a requisition to restore possession to him. It is not necessary however to pursue this aspect of the matter further. The point that I wish to make is that the learned Judges of the Appellate Bench of the High Court thought it a *mala fide* application of the Act to allot premises to



a tenant who had been evicted from them on the ground that he had not paid rent I find no distinction between that case and one allotting premises to a person who has been directed by a Court to be evicted on the ground that the landlord is entitled to their possession in preference to the person in whose right he was there. In my view, the Requisition Act was not intended to be utilised for putting the evicted person back in possession in either case, in each case the requisition would be *mala fide*. The requisitioning authorities were fully aware of all the facts of the litigation between the appellants and the Nambiaris and I cannot help wondering how notwithstanding that they thought fit to make the order of requisition. I do not wish to say that they deliberately set the decree of Court at naught but I am clearly of opinion that they completely misconceived their powers under the Requisition Act.

There is yet another aspect of the case which has led me to the view that the requisition order was outside the Act. I have already stated that the Rent Act provides by section 13 (1) (g) that an order of eviction may be made against a tenant where the premises are reasonably and *bona fide* required by the landlord for his own occupation. Section 17 of the Act states that where a decree for eviction has been passed on such a ground—I have held that the decree for eviction in the present case was passed on that ground—and the premises are not occupied within a period of one month from the date the landlord recovers possession, the landlord is liable to a penalty of imprisonment or fine and, what is important, the Court may also on the application of the evicted person order the landlord to place him in occupation of the premises on the original terms and conditions. Now section 6 of the Requisition Act says that when premises become vacant as a result of the tenant having been evicted, the landlord shall give intimation of the vacancy to the prescribed authority within seven days and he shall not occupy the premises or permit them to be occupied by anyone before giving the intimation of vacancy and also for one month from the date when the intimation given is received by the authority. It would appear, therefore, that a conflict will arise between the two Acts if both were applicable at the same time in a case where the tenant has been evicted on the ground that the landlord required the premises for personal occupation, under one the landlord has to occupy the premises within a month while under the other he cannot occupy them for a month or longer. This conflict must be harmonised and the only way to do so is to say that the Requisition Act does not apply to a case where the landlord has been permitted to recover possession for his own occupation. This would leave both the Acts a fair field on which to operate. Otherwise the provision of the Rent Act requiring the landlord to occupy the premises earlier referred to would become completely ineffective. I may also add that the Rent Act is a special law dealing with the relations between landlords and tenants while the Requisition Act is a general Act dealing with the requisition of all vacant premises. To give the Requisition Act preference over the Rent Act would be to hold that a general statute overrides a special one. This would be against the accepted canons of interpretation. To my mind, this affords a further ground for saying that it was not intended that the Requisition Act would apply to such a case. The present is precisely a case of the same kind.

A suggestion was made on behalf of the respondents that the order of requisition and the order of allotment were separate and that being so the requisition order would not become invalid because the allotment had been made to a person to whom it could not be made under the Act. I should at once state that in the view that I have earlier taken, the question does not arise for in my view the requisition order made in this case was itself bad for no requisition could be made in a case where a landlord has been held entitled by Court to evict the tenant as he requires the premises for his personal occupation. I will also consider the argument apart from this aspect of the case. I do not think that the two

orders were separate. Assume however that they were so. Even then *ex concessis* the order of allotment is outside the Act and therefore bad. If both were good or both were bad, it would be to no purpose to discuss whether there were two orders or one. The allotment order has, therefore, in any event, to go. If the allotment order was unjustified, the requisition order would also fall, for it is not said that there was any homeless person other than K.A. Nambiar to whom the allotment had been made, for whom it was necessary to requisition the premises. I do not think the Act contemplates a requisition *in vacuo*; there must be a public, that is to say, a prospective or actually homeless person in view before a requisition can be made. I think that there are observations in *Bhanji Munji's case*<sup>1</sup> supporting that view. It is not in dispute that in this case there was no homeless person prospective or actual to the knowledge of the requisitioning authorities who required accommodation, except K.A. Nambiar. He had given intimation of the vacancy and had at the same time requested that the room be requisitioned and allotted to him. Both the orders were besides made on the same day. It is obvious that the two orders are connected and, therefore, really one. The contention that the orders were separate is, to my mind, too naive to be accepted. There is in the present case, therefore, really one order and that must go.

In the course of the hearing in this Court our attention was repeatedly drawn to the fact that this was a case of a "suppressed vacancy". What was meant by "suppressed vacancy" was that the appellants had failed to give notice of the vacancy as required by section 6 of the Requisition Act. On the facts, it has to be held that the appellants had not given the necessary notice. But I do not see that that makes any difference to the present case. The Requisition Act nowhere says that larger powers of requisition may be exercised where the required notice has not been given. Those powers are the same whether notice has or has not been given. All that the Act says is that on the failure to give notice the landlord would incur a penalty by way of imprisonment or fine: *see* section 6 (5). I find nothing in the case of *Bhanji Munji*<sup>1</sup> contrary to this view or contrary to anything that I have said in this judgment.

I would for these reasons allow the appeal with costs throughout.

*Raghubar Dayal, J.*—(for himself and on behalf of *Ramaswami, J.*)—The appellants, in this appeal by Special Leave, are the trustees-owners of Kutchi House situate at Brahmanwada Road, Matunga, Bombay. They purchased the property in 1948.

One P. S. Nambiar was at the time tenant in occupation of room No. 26 on the second floor of the Kutchi House. He paid rent at Rs. 20.68 per month exclusive of electricity. He did not pay rent from 1st January, 1956. He left the premises sometime without informing the appellants and after putting K.A. Nambiar in possession of the room. In 1958 the appellants sued for ejectment of P.S. Nambiar and K.A. Nambiar from room No. 26 in the Court of Small Causes, Bombay, on grounds:

"(a) that the defendant P. S. Nambiar has sublet and/or assigned his interest in the suit premises without the permission of the plaintiffs and in breach of the provisions of Bombay Act LVII of 1947;

(b) that the said defendant No. 1 has been in arrears of rent and/or compensation from 1st January, 1956 at the rate of Rs. 20.68 exclusive of electricity charges; and

(c) that the premises are required by the plaintiffs for their own use and occupation *bona fide* and reasonably".

On any of these grounds the landlord could evict the tenant in view of the provisions of section 13 of Act (LVI of 1947) *viz.*, the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter called the Rent Act). The proceedings were to be taken in the Court of Small Causes, Bombay, in view of section 28 of that Act.

1. (1955) S.C.J. 10: (1955) I S.C.R. 777.

The suit was decreed *ex parte* on 5th August, 1958. The decree directed the defendants to vacate the room by 16th August, 1958. The decree-holders actually got possession of the room on 30th April, 1959, as proceedings were taken against K.A. Ramakrishnan who had obstructed the execution of the warrant of possession on 30th September, 1958 and as K.A. Nambiar also took proceedings for the setting aside of the *ex parte* decree.

On 1st May, 1959, K. A. Nambiar applied to the Controller of Accommodation for requisitioning the premises, room No. 26, under the Bombay Land Requisition Act, 1948 (XXXIII of 1948) hereinafter called the Act, and for allotting it to him as he had been evicted therefrom on 30th April, 1959. On 11th July the Accommodation Officer issued a notice to the appellants to show cause why the room be not requisitioned under the Act. The appellants showed cause and, by his letter, dated 17th August, 1959, the Accommodation Officer informed the appellants that on the evidence available to him he had come to the conclusion that it was a case of suppressed vacancy. Against the order of the Accommodation Officer the appellants appealed to the Government of Bombay.

On 10th September, 1959 the Government of Bombay issued the requisition order. It reads:

'Whereas, on inquiry it is found that the premises specified below had become vacant on the 30th day of April, 1959

Now therefore in exercise of the powers conferred by clause (a) of sub-section (4) of section 6 of the Bombay Land Requisition Act, 1948 (Bombay Act XXXIII of 1948), the Government of Bombay, is pleased to declare that the said premises had become vacant after 4th December, 1947 and to requisition the said premises for a public purpose, namely, for housing a homeless person.

#### Premises

Room No. 26 2nd Floor, Kutchu House, etc

By the order and in the name of the Governor of Bombay,

Sd /

Accommodation Officer'

On 12th September, room No. 26 was allotted to K. A. Nambiar. He was required to pay to the landlord on behalf of the Government, in advance, on or before the 10th day of every month, compensation at the rate of Rs. 20-68 per month in respect of the premises and to send to the Controller of Accommodation a certificate of such payment counter-signed by the landlord on or before the 15th day of each month.

The appellants then addressed an application to the Revenue Minister on 14th September, 1959. On 25th September, the Deputy Minister of Revenue interviewed the representatives of the appellants in the presence of K.A. Nambiar and the Controller of Accommodation.

On 30th September, the appellants filed a petition in the High Court of Bombay against the State of Bombay and the Accommodation Officer, Bombay, *inter alia* for the issue of a writ of *mandamus* under Article 226 of the Constitution against the respondents directing them to cancel or withdraw the orders of requisition and allotment. The petition was contested by the respondents. The learned single Judge who heard the petition held that room No. 26 came within the definition of 'premises' and that the requisition order was not *mala fide*. The contention to the effect that the appellants had given necessary intimation of vacancy by their letter, dated 3rd May, 1959, was not pressed in view of the denial of the receipt of any such notice by the Government. The other contention about the requisition order being against the pronounced policy of the Government was rejected. The result was that the appellants' petition was dismissed.

The appellants then filed an appeal under the Letters Patent. This appeal also failed. The appellate Bench agreed with the findings of the learned single Judge on the question of room No. 26 being 'premises' within the definition of that word in the Act and on the requisition order being not made *mala fide*. The contention that there was no statutory vacancy in respect of room No. 26 which could have been the subject-matter of requisition by the respondents was not pressed. It is against this order of the appellate Bench of the High Court that this appeal has been filed.

Besides the two contentions urged before the High Court, it has also been contended for the appellants that the premises were not vacant as contemplated by the Act and that therefore they could not have been requisitioned.

The requisition order is made under section 6 (4) of the Act. Sub-section (1) of section 6 reads:

"If any premises situate in an area specified by the State Government by notification in the Official Gazette, are vacant on the date of such notification and wherever any such premises are vacant or become vacant after such date by reason of the landlord, the tenant or the sub-tenant, as the case may be, ceasing to occupy the premises or by reason of the release of the premises from requisition or by reason of the premises being newly erected or reconstructed or for any other reason the landlord of such premises shall give intimation thereof in the prescribed form to an officer authorised in this behalf by the State Government."

Sub-section (2) requires the landlord to give an intimation to the State Government by registered post within 7 days of the premises becoming vacant or becoming available for occupation. Sub-section (3) prohibits the landlord without the permission of the State Government to let, occupy or permit to be occupied such premises before giving the intimation and for a period of one month from the date on which the intimation is received by the State Government. Sub-section (4) reads:

"Whether or not an intimation under sub-section (1) is given and notwithstanding anything contained in section 5, the State Government may by order in writing—

(a) requisition the premises for any public purpose and may use or deal with premises for any such purpose in such manner as may appear to it to be expedient.....:

Provided that where an order is to be made under clause (a) requisitioning the premises in respect of which no intimation is given by the landlord, the State Government shall make such inquiry as it deems fit and make a declaration in the order that the premises were vacant or had become vacant, on or after the date referred to in sub-section (1) and such declaration shall be conclusive evidence that the premises were or had so become vacant."

Sub-section (5) provides for penalty for failure to give the necessary intimation required by sub-section (2). *Explanation* to section 6 reads:

"For the purposes of this section—

(a) premises which are in the occupation of the landlord, the tenant or the sub-tenant, as the case may be, shall be deemed to be or become vacant when such landlord ceases to be in occupation or when such tenant or sub-tenant ceases to be in occupation upon termination of his tenancy, eviction, assignment or transfer in any other manner of his interest in the premises or otherwise, notwithstanding any instrument or occupation by any other person prior to the date when such landlord, tenant or sub-tenant so ceases to be in occupation;

(b) premises newly erected or re-constructed shall be deemed to be or become vacant until they are first occupied after such erection or reconstruction."

It is true that the State Government can requisition premises only. 'Premises' is defined in clause (3) of section 4. The relevant portion of the definition is:

"'premises' means any building or part of a building let or intended to be let separately."

The contention for the appellants is that the appellants had sought and got decree for the ejectment of P.S. Nambiar and K.A. Nambiar *inter alia* on the ground that they required the premises reasonably and *bona fide* for occupation by themselves, a ground mentioned in section 13 (1) (g) of the Rent Act, that room No. 26

could not be said to be intended to be let on the ejection of the Nambiar on 30th April, 1959 and therefore did not come within term 'premises'. The argument is that the intention about the letting of the building or part of it is not to be determined once for all when it is let but is to be determined on each occasion the part of the building falls vacant. If the same intention exists then, the part of the building will answer the definition of premises, but if such an intention does not exist and the landlord intends to occupy the building himself or even does not intend to let it the building would not come within the definition of the word 'premises'. We consider this argument unsound. If accepted, the purpose of the Act will be mostly defeated. While the object of the Rent Act was to control the rent payable by a tenant and his eviction from the premises, the object of the Act was to requisition premises for making them available to the persons in need of accommodation. Both sections 5 and 6 empower the State Government to requisition land or premises for a public purpose. The Government has to have complete control over the buildings from the time the Requisition Act came into force, so that it could effectively meet the requirements of the persons in need of accommodation. Such a control has been given to the Government by the provisions of the Act.

The word 'premises' means, as already stated, any building or part of a building let or intended to be let separately. It has been urged for the appellant that the expression 'let or intended to be let separately' govern both the word 'building' and the expression 'part of a building'. We are of the view that this is not really so and that this expression governs only the clause 'part of a building'. 'Intended to be let separately' cannot have any reasonable meaning with reference to a building. There is no question of its being intended to be let separately. It is to be let or not to be let. 'Let or intended to be let separately' can apply only to the letting of a part of a building as rightly a landlord of a building is not to be forced to let a part of the building when he is in occupation of it. It follows then that all buildings, irrespective of the fact whether they were let or were intended to be let at the time the Act came into force came within the expression 'premises' and therefore could be requisitioned by the Government if the requirements of sections 5 and 6 were satisfied. If the buildings come under the control of the Government from the date of the enforcement of the Act, there is no reason why part of a building which was let or which was intended to be let separately on such a date be not thereafter under the control of the Government for the purposes of the Act. It would be impracticable to decide every time a part of a building fell vacant, whether the landlord intends or does not intend to let it. It appears that the Act contemplated every building to be available for letting whenever it fell vacant be it in the occupation of the tenant or of the landlord at the time the Act came into force, as sub-section (1) of section 6 contemplates premises becoming vacant after the date of the notification by the State Government under that section by reason of the landlord ceasing to occupy premises or by reason of the release of the premises from requisition. The premises on the landlord's ceasing to occupy them, become vacant and therefore subject to an order of requisition by the State Government. So long as the landlord was occupying the building or part of a building, it would not come within the definition of 'premises' if the argument for the appellants that the intention to let must be determined on each occasion of a building or part of a building falling vacant. The expression 'premises' in section 6 (1) of the Act clearly contemplates buildings in the occupation of the landlord, buildings which were neither let nor could possibly be said during the period of occupation to be intended to be let. We are therefore of the view that from the date of the enforcement of the Act, every building comes within the expression 'premises' and that a part of a building comes within the expression if it is let or if it is intended to be let separately on that date. Room No 26, which had been let, was 'premises' within the meaning of that term in the Act. The fact that the appellants got the Nambiar ejected from room No 26 on the

ground that they themselves reasonably and *bona fide* required the premises for their use and intended to occupy it, does not make room No. 26 cease to be 'premises'.

The second contention about the premises being not vacant when requisitioned has no force. There is no doubt that the Government can requisition premises which are vacant. Sub-section (2) of section 6 requires the landlord to give notice of the vacancy of the premises within a week of its falling vacant. If such notice is received and the Government requisitions the building within a month of receiving the notice, no question about the vacancy of the premises can arise for determination. If no such intimation is given by the landlord, the proviso to clause (a) of sub-section (4) of section 6 requires the State Government to make such enquiry as it deems fit and make a declaration in the order of requisition itself that the premises were vacant or had become vacant on or after the date of the notification under sub-section (1) of section 6. Such a declaration is made conclusive evidence of the premises being vacant or having become vacant.\* Such a declaration is made in the requisition order dated 10th September, 1956, requisitioning the premises in suit. It is therefore not open to the appellant to urge successfully that the premises in suit did not become vacant or were not vacant when the requisition order was passed.

It may be further mentioned that the premises became vacant in view of sub-section (1) of section 6 and *Explanation* to section 6 when the tenant ceased to occupy it due to eviction in execution of the decree secured by the appellant. The premises became vacant on 30th April, 1959. The fact that the appellants secured the eviction of P.S. Nambiar and K.A. Nambiar *inter alia* on the ground that they required the premises for their use, does not affect the question of the premises becoming vacant on 30th April. Even if the appellants had actually occupied the premises after 30th April, 1959, of which there is no good evidence on record, the fact remains that the premises had become vacant on the eviction of the tenant. In view of these considerations, we reject the second contention.

The other contention is that the requisition order was made *mala fide*. There is no allegation that the State Government is in any way interested in K.A. Nambiar in whose favour the allotment order was made after the requisitioning of the premises. *Mala fides* are alleged merely on the ground that the premises were requisitioned for allotting them to K.A. Nambiar who had illegally occupied them when P.S. Nambiar ceased to occupy them, had not paid the rent to the landlords-appellants, took various steps to delay the execution of the decree for ejectment secured by the landlords-appellants and applied to the Accommodation Officer for allotment of the house on the day following the ejectment. These circumstances do not, in law, make the requisition order *mala fide* when the order was not made on account of any animus against the appellants or for a purpose for which requisition could not have been made.

Sub-section (4) of section 6 empowers the State Government to requisition premises for a public purpose. It has been held that requisitioning the premises for allotment to a person who is homeless *i.e.*, who has no premises to occupy, would be requisitioning for a public purpose, vide *The State of Bombay v. Bhanji Munji*<sup>1</sup> where this Court said at p. 785:

"If therefore a vacancy is allotted to a person who is in fact houseless, the purpose is fulfilled."

It may not appear very right, on grounds of sentiment and propriety, that a tenant who has not behaved properly towards the landlord and had been remiss in his duties as a reasonable tenant be allotted the same premises after he had been evicted in execution of a decree passed by a Court of law in pursuance of

the practice that the first informant of the existence of a suppressed vacancy would be allotted those premises but allotment to such a person is not against the law. One homeless person is as good as another. The conditions of allotment of requisitioned premises ensure that the landlord would not be put to any further trouble so far as the collection of rent is concerned.

Section 8 B of the Act empowers the State Government to realise the dues which the allottee has to pay and has failed to pay as arrears of land revenue. The allotment order Exhibit J dated 12th September, 1959, required the allottee to deposit a certain sum by way of security for the due observance of the terms and conditions subject to which the allotment was made. It also required the allottee to pay to the landlord in advance on or before the 10th day of every month, compensation at the rate of Rs 20-68 per month in respect of the premises. The allotment order is subject to some other conditions also which in the ultimate analysis enures to the benefit of the landlord.

It has been further urged that homeless person does not include one who has been evicted on the ground that the landlord requires the premises for his own use and occupation as the decree for ejectment on such a ground can be passed only if the Court is satisfied that having regard to the circumstances of the case, including the question whether other reasonable accommodation will be available for the landlord or the tenant, greater hardship would not be caused by passing the decree than by refusing to pass it.

Section 13 (1) (g) of the Rent Act entitles the landlord to recover possession of the premises if the Court is satisfied that the premises are reasonably and *bona fide* required by the landlord for occupation by himself or by any person for whose benefit the premises are held or where the landlord is a trustee of a public charitable trust that the premises are required for occupation for the purposes of the trust. It is open to doubt whether a trustee-landlord, as the plaintiffs appellants are, can be said to require the premises for occupation for himself. The first part of section 13 (1) (g) appears to contemplate persons who receive or are entitled to receive rents on their own account and not to persons who receive or are entitled to receive rents as a trustee. A trustee landlord can require the premises under section 13 (1) (g) for occupation for purposes of the trust. The trustee landlord himself need not be a homeless person. No occasion arose in the ejectment suit for the Court to determine whether reasonable accommodation was available for the tenant and whether greater hardship would be caused to the landlord if no ejectment be ordered as the suit was uncontested.

The provisions of section 13 (2 A) of the Rent Act show that the needs of the Armed Forces of the Union or their families get precedence over the needs of the landlord. The needs of the landlord therefore are not such a controlling factor as to override the provisions of the Act if the requisition of the premises in suit comes within them. Requisition under the Act is for a public purpose and there seems to be no good reason why the needs of the landlord be not deemed subservient to the requirements of public purpose as judged by the State Government.

Another ground for the non applicability of the Act to such ejected person is urged on the basis of the provisions of section 17 of the Rent Act. Sub-section (1) of section 17 empowers the Court to order the landlord to re-allot the premises to the tenant who had been evicted therefrom in case the landlord does not occupy the premises within a period of one month or if the landlord re-allots the premises to another person within a year of the tenant's eviction. The Court has a discretion to pass such an order on the application of the tenant. If the Act provides by section 6 that the landlord cannot occupy the premises which had become vacant on the eviction of the tenant within a month of the

receipt of the intimation of vacancy by the State Government, there is no conflict between that provision and the discretionary power vested in the Court under sub-section (1) of section 17. The Court, undoubtedly cannot exercise such a discretionary power when another enactment by its language provides for the landlord's not occupying the premises for a period in excess of a month. Under sub-section (2) of section 17, a landlord is liable to conviction if he keeps the premises unoccupied without reasonable cause or if he fails to comply with the order passed under sub-section (1) of section 17. No question of conviction in the latter circumstances arises if as indicated earlier the Court will not pass an order of re-allotment to the evicted tenant in case the premises are subject to the provisions of section 6 of the Act. The non-occupation of the premises within one month of the ejection of the tenant on the ground that the premises are situate in an area covered by the notification under section 6 (1) of the Act will be no occasion for a conviction for reasonable cause and therefore there can be no occasion for a conviction on the ground that the premises were kept unoccupied within a period of one month from the date of recovery of possession. ♀

We do not therefore consider that there is any real conflict between the provisions of section 6 of the Act and the provisions of section 13 or 17 of the Rent Act.

It is also to be noticed that the Act was enacted later than the Rent Act. The Legislature is presumed to know the provisions of the Rent Act. It did not make an exception from requisition with respect to premises becoming vacant on the eviction of a tenant on the ground mentioned in section 13 (1) (g) of the Rent Act. On the contrary, not only sub-section (1) of section 6 speaks of the vacancy of the premises on a tenant ceasing to occupy them but the *Explanation* to section 6 clearly states that the premises which are in the occupation of a tenant shall be deemed to become vacant when such tenant ceases to be in occupation by eviction. An exception could have been made in case of evictions for a particular reason, such as in clause (g) of sub-section (1) of section 13 of the Act. The Legislature made no such exception.

The fields of operation of the two Acts, the Rent Act and the Act, are different. The Rent Act deals with the question arising between the landlord and the tenant on account of the incidents of tenancy, while the Act deals with the necessities of a public purpose as determined by Government in a particular area for which a notification under sub-section (1) of section 6 has been issued, keeping in mind the interests of the landlord also.

The civil Court, in deciding a suit for eviction, simply takes into consideration the needs of the landlord *vis-a-vis* the tenant and the grounds of eviction. It does not take into consideration the requirements of any public purpose. It adjudicates between the rights of the landlord and the tenant in accordance with the statutory provisions of the Rent Act. The State Government on the other hand, when considering the question of requisitioning the premises under sub-section (4) of section 6 does not consider such matters but considers only whether the purpose for which it is to requisition the premises is a public purpose or not. If it is satisfied that it requires the premises for a public purpose it has not to consider the considerations affecting the landlord except when the landlord applies for permission under section 6 (3) of the Act. It has certainly no occasion to consider the interests of the tenant as the premises can be requisitioned only when they are vacant or are deemed vacant in view of somebody occupying it in contravention of the provisions of the Act. If the Government happens to requisition the premises for the person who had been evicted therefrom, in execution of a decree of a civil Court it does not mean that the Government is not respecting the decree of the Court and is acting against public interest or the interests of administration of justice.



To hold that the benefit of the Act cannot be given to persons evicted on the ground that the landlord required the premises for his use would not only deprive the evicted person from getting the premises allotted to himself but would also deprive many other homeless persons besides some special class of persons allotments to whom would clearly come within public purpose. Merely because there is a possibility of the evicted person getting allotted the premises he had been evicted from, does not appear to us to be good reason for holding that the provisions of section 6 of the Act do not apply to the requisitioning of premises when the premises became vacant on the eviction of a tenant by a civil Court on the ground that the landlord required the premises for his own use.

K. A. Namhiar is no party to these proceedings and this should also prove fatal to the writ petition by the appellants when the appellants seek the quashing of the order of requisition and the order of allotment to K. A. Namhiar.

We therefore agree with the High Court that the requisition order cannot be said to be *mala fide*. The result will be that the appeal fails and is dismissed with costs.

ORDER OF THE COURT—In accordance with the opinion of the majority the appeal is dismissed with costs.

K. G. S.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. R. MUDHOLKAR, R. S. BACHAWAT AND RAGHUBAR DAYAL, JJ.

Indian Chemical Products, Ltd.

.. Appellant\*

v.

.. Respondents.

State of Orissa and another

*Companies Act (VII of 1913), section 38 and Regulations in Table 'A', First Schedule—Rectification of share register—Transmission by operation of law—'Transfer' and 'Transmission', distinction—Discretion of directors to refuse recognition of transfer—Powers of Court to control.*

The Maharaja of Mayurbanj State as the Ruler of that State was one of the seven shareholders of the Indian Chemical Products Ltd., a limited company and held 7,500 shares therein; all the shareholders subscribed to the Memorandum of Association of the company incorporated on 29th November, 1947.

By a series of constitutional changes since Independence the territory of Mayurbanj State in the State of Orissa and all the public properties of the State became vested in the State of Orissa, unless the purposes for which the property was held was for central purposes. The Government of India, by a certificate, dated 10th November, 1953, declared that the 7,500 shares were not held for central purposes. Thus the State of Orissa became the legal owner of the shares by operation of law and the directors of the company were bound to enter its name in the place of the Maharaja.

The State also based its claim to the shares on a formal instrument of transfer executed by the Maharaja. On 16th March, 1950, the Government of Orissa lodged the share scrip and the transfer deed with the company and requested it to make the necessary changes in the Share Register; the Maharaja also through his agent, the Imperial Bank of India repeatedly requested the company to register the Secretary to the Government of Orissa, Finance Department, as the holder of the said shares. The company refused to so register.

On 31st December, 1953, Sri S. K. Mandal, Attorney for the State of Orissa, requested the company to record the name of the State as the owner of the shares in the Share Register; but the company declined to do so.

The State thereupon filed an application under section 38 of the Companies Act (VII of 1913) for rectification of the Share Register by inserting its name in the place of the Maharaja and it was allowed by Ray, J., on 22nd November, 1956. The Company appealed against the order to a Division Bench and the appeal was dismissed.

Both the Courts held that (1) the title to the shares vested in the State by operation of law; (2) the refusal of the company to register the transfer was *mala fide*; (3) the State of Orissa was entitled to rectification of the Share Register and a proper case was made out for the exercise of the Court's jurisdiction under section 38 of the Companies Act, 1913; (4) the petition was not liable to be dismissed on the ground that the State had asked the company to register the name of the Secretary of the Government of Orissa as the shareholder. The appellate Court had also held that the Board of Directors had no power to refuse registration when the transfer was by operation of law.

The company appealed to the Supreme Court on a certificate granted by the High Court against the order for rectification.

Held, the State of Orissa had acquired title to the shares by operation of law; the company could not decline to register the name of the State in place of the Maharaja.

Article 1-A of the Articles of the company attracts the Regulations in Table 'A' of the First Schedule to the Act (VII of 1913). Table 'A' makes a distinction between 'transfer' and 'transmission' of shares. The regulations require that the instrument of transfer shall be executed by both the parties. Transmission by operation of law is not such a transfer. Devolution by operation of law is not within its purview. Article 11 of the Company's articles being a restrictive provision must be strictly construed; it does not confer upon the Board of Directors power to refuse recognition of a devolution of title by operation of law.

Clause 22 of the Regulations in Table 'A' no doubt confers power upon the Board to decline registration of transmission of title by the death or insolvency of a member. In the instant case, that clause has no application.

5th May, 1966.

It is only by way of abundant caution that the instrument of transfer of shares was got executed and lodged with the company along with the scrip. The claim based on the transfer was within the purview of Article 11. Even with regard to this claim the Courts below have rightly held that the Board acted *malà fide* in refusing to register the transfer.

Clause 6 of the Memorandum of Association which states that the company and the Maharaja (previous holder of shares) proposed to enter into an agreement, only shows that there was a proposal but not a concluded agreement and there was no obligation on the Maharaja to execute the agreement. The argument in the High Court that the refusal was based on the refusal of the State to enter into the proposed agreement was only an after thought (*vide* the letter dated 17th March, 1953, assuring the Imperial Bank that the registration would be effected shortly).

Further the directors cannot exercise their powers under Article 11 to force the State to enter into the proposed agreement.

The power under Article 11 to refuse registration is a discretionary power, it must be exercised reasonably and in good faith. The Court can control the discretion if exercised 'capriciously or *malà fide*'.

The contention that the petition was liable to be dismissed because the State had asked for registration in the name of the Secretary Finance Department could not be accepted, no such objection was taken at all. [Moreover the Attorney for the State, Sri S. K. Mandal by letter, dated 1st December, 1953, had called upon the company to record the name of the State in place of the Maharaja.]

The name of the State of Orissa has, without sufficient reason been omitted and there is also default in not entering in the register the fact of the Maharaja ceased to be a member. The jurisdiction under section 38 is therefore attracted.

Appeal from the Judgment and Order dated the 5th September, 1960, of the Orissa High Court in Appeal under Orissa High Court Order No. 4 of 1956.

*N. C. Chatterjee* and *Ranadev Chaudhri*, Senior Advocates (*G. S. Chatterjee* and *S. C. Majumdar*, Advocates, with them), for Appellant.

*C. K. Daphtry*, Attorney General for India (*N. D. Karkhanis* and *R. N. Sachthy* Advocates, with him), for Respondent No. 1.

The Judgment of the Court was delivered by

*Bachawat, J.*—On 29th November, 1947, the Indian Chemical Products, Ltd., a limited company, was incorporated having its registered offices in Baripada, Mayurbhanj and in the town of Calcutta. Its authorised capital is Rs. 25 lakhs divided into 25,000 shares of Rs. 100 each. The company has seven shareholders. The Maharaja of Mayurbhanj subscribed and paid for 7,500 shares. The remaining six shareholders hold 150 shares only. All the shareholders are signatories to the memorandum of association of the company. The State of Orissa claims that by reason of the constitutional changes since the declaration of independence, all the shares held by the Maharaja of Mayurbhanj have now vested in it by operation of law. The State also based its claim to the shares on a formal instrument of transfer executed by the Maharaja. On 16th March, 1950, the Government of Orissa lodged the share scrip and the transfer deed with the company, and requested it to make the necessary changes in the share register. The Government as also the Maharaja, through his agent, the Imperial Bank of India, repeatedly requested the company to register the Secretary to the Government of Orissa, Finance Department as the holder of the shares in place of the Maharaja. There was protracted correspondence in the matter for over three years and eventually on 16th May, 1953 the Board of Directors of the company refused to register the transfer. On 1st December, 1953, Sri S. K. Mandal, Attorney for the State of Orissa, requested the company to record the name of the State as the owner of the shares in the share register, but the company declined to do so. On 9th February, 1955, the State of Orissa filed an application under section 38 of the Indian Companies Act, 1913 in the High Court of Orissa asking for rectification of the share register by inserting its name as the holder of the shares in place of the Maharaja. The company and the Maharaja were impleaded as respondents. The application was contested by the company only. On 22nd November, 1956, Ray, J. allowed the application. On 13th September, 1957, he passed a supplemental order directing the filing of the notice of rectification with the Registrar with-

in a fortnight. On 5th September, 1960, a Division Bench of the High Court dismissed the appeal preferred by the company. The company now appeals to this Court on a certificate granted by the High Court.

Both Courts concurrently held that (1) the title to the shares vested in the State of Orissa by operation of law ; (2) the refusal of the Board of Directors to register the transfer was *mala fide* ; (3) the State of Orissa was entitled to rectification of the share register and a proper case for the exercise of the Court's jurisdiction under section 38 of the Indian Companies Act, 1913 had been made out ; (4) the petition was not liable to be dismissed on the ground that the State had asked the company to register the name of the Secretary to the Government of Orissa, as the shareholder in place of the Maharaja. The appellate Court also held that under the articles of association of the company the Board of Directors had no power to refuse registration of a transfer where the transfer was by operation of law. The appellant challenges the correctness of these findings.

The Courts below concurrently found that the 7,500 shares were held by the Maharaja in his capacity as Ruler of the State of Mayurbhanj. This finding is amply supported by the documentary evidence on the record and is no longer challenged. The State of Mayurbhanj was one of the feudatory States of Orissa under the suzerainty of the British Crown. As from 15th August, 1947, with the declaration of Independence the paramountcy of the British Crown lapsed. Thereafter, steps were taken for the integration of the State with the Dominion of India. On 16th October, 1948, the Maharaja of Mayurbhanj signed an agreement for the merger of the State with the Dominion. By Article 1 of this agreement, the Maharaja completely ceded to the Dominion his Sovereignty over the State of Mayurbhanj as from 9th November, 1948. Article 4 of the agreement allowed the Maharaja to retain the ownership of his private properties only as distinct from the State properties. On and from 9th November, 1948, as a necessary consequence of the cesser of Sovereignty all the public properties of the State including the 7,500 shares in the company vested in the Dominion. By operation of law in consequence of the change of sovereignty, all the public properties of the State which were vested in the Maharaja as the Sovereign Ruler devolved on the Dominion as the succeeding Sovereign.

As from 1st January, 1949, the Government of India in exercise of its powers under section 3 (2) of the Extra Provincial Jurisdiction Act (XLVII of 1947) delegated to the Government of Orissa the power to administer the territories of the merged State. On 1st August, 1949, the States Merger (Governor's Provinces) Order, 1949 came into force, and in consequence of section 5 (1) of the Order, all property vested in the Dominion Government for purposes of governance of the merged State become from that date vested in the Government of Orissa, unless the purposes for which the property was held were central purposes. By a certificate dated 10th November, 1953, the Government of India declared that the 7,500 shares were not held for central purposes. Under the Constitution which came into force on 26th January, 1950, the territories of the merged State were included in the State of Orissa. By reason of these successive constitutional changes, the shares became vested in the State of Orissa. The State is now the legal owner of the shares and the directors of the company are bound to enter its name in the Register of members, unless there is some restrictive provision in the Articles authorising them to refuse the registration.

The company contends that under its Articles the directors have the power to refuse the registration. It relies on Article 11, which reads :  
 "The Board of Directors shall have full right to refuse to register the transfer of any share or shares to any person without showing any cause or sending any notice to the transferee or transferee or."

The Board may refuse to register any transfer of shares on which the Company has lien."  
 Article 1-A attracts the Regulations in Table A of the First Schedule to the Indian Companies Act, 1913 so far as they are applicable to private companies and are not inconsistent with the Articles. The Regulations in Table A make a distinction between transfer and transmission of shares. In respect of a transfer, they

require that the instrument of transfer shall be executed both by the transferor and the transferee. A transmission by operation of law is not such a transfer. In *In re Bentham Mills Spinning Company*<sup>1</sup>, James, L.J. said

In Table A the word *transmission* is put in contradistinction to the word 'transfer'. One means a transfer by the act of the partners, the other means transmission by devolution of law."

Article 11 refers to transfers. A devolution of title by operation of law is not within its purview. Being a restrictive provision, the article must be strictly construed. In the instant case, the title to the shares vested in the State of Orissa by operation of law, and the State did not require an instrument of transfer from the Maharaja to complete its title. Article 11 does not confer upon the Board of Directors a power to refuse recognition of such a devolution of title. We may add that we express no opinion on the question whether such an article applies to an involuntary transfer of shares by a Court sale having regard to the provisions of Order 21, rule 80 of the Code of Civil Procedure with regard to the execution of necessary documents of transfer.

Clause 22 of the regulations in Table A read with Article 1 A confers power upon the Board of Directors to decline registration of transmission of title in consequence of the death or insolvency of a member. In the instant case, there is no transmission of title in consequence of death or insolvency, and clause 22 has no application. Under the Articles, the directors had therefore no power to refuse registration of the devolution of title on the State of Orissa by operation of law in consequence of the constitutional changes.

Though the State of Orissa had acquired title to the shares by operation of law, by way of abundant caution it obtained a deed of transfer and lodged it with the company together with the share scrip. The transfer deed was duly stamped and complied with all the formalities required by law. The claim of the State of Orissa based upon the transfer deed was within the purview of Article 11. Even with regard to this claim, the Courts below concurrently held that the Board of Directors acted *mala fide* in refusing to register the transfer. This finding is amply supported by the materials on the record. In spite of the fact that the State had filed with the company a certificate of the Collector of Stamp Revenue, West Bengal that no stamp duty was payable on the transfer, the company raised the objection that the transfer deed must be stamped. To avoid this objection, the Government stamped the deed and again lodged it with the company. For over three years, the directors delayed registration of the transfer on frivolous pretexts. On 16th May, 1953, the directors without assigning any reason declined to register the transfer. Before the High Court, the company asserted that the registration was refused because the Maharaja of Mayurkhanj was under an obligation to execute an agreement conferring valuable rights on the company and the State of Orissa had failed to honour this obligation. Reliance was placed on clause 6 of the company's Memorandum of Association, which stated that the company and the Maharaja proposed to enter into an agreement and a copy of the proposed agreement was annexed. Clause 6 shows that there was a proposal between the parties to enter into an agreement, but there was no concluded agreement between them, nor was there any binding obligation on the Maharaja to execute an agreement. The directors could not use their power of declining to register the transfer under Article 11 for the purpose of forcing the State of Orissa to enter into the proposed agreement. Actually, the reason given at the trial was an afterthought. The Imperial Bank of India representing the Maharaja was pressing for registration of the transfer. By its letter dated 17th March 1953, the company assured the Bank that the registration would be effected shortly. Nevertheless, on 16th May, 1953 the directors capriciously refused to register the transfer.

The power under Article 11 to refuse registration of the transfer is a discretionary power. The directors must exercise this power reasonably and in good faith. The Court can control their discretion if they act capriciously or in bad faith. The

11]

directors cannot refuse to register the transfer because the transferee will not enter into an agreement which the directors conceive it to be for the interests of the company.

We cannot accept the contention that the petition was liable to be dismissed because the State of Orissa had asked for registration in the name of the Secretary, Finance Department. No such objection was taken by the company, although it had taken numerous other objections. Moreover, by letter dated 1st December, 1953 Shri S. K. Mandal, the Attorney for the State of Orissa, had definitely called upon the company to record the name of the State as the owner of the shares in the share register. In spite of this letter, the company refused to make the necessary registration.

The Maharaja of Mayurbhanj has ceased to be the owner of the shares. The State of Orissa is now their owner, and has the legal right to be a member of the company and is entitled to say that the company should recognise its membership and make an entry on the register of the fact of its becoming a member and its predecessor-in-title, having ceased to be a member. The name of the State of Orissa, has, without sufficient reason, been omitted from the Register and there is default in not entering in the Register the fact of the Maharaja having ceased to be a member. The Court's jurisdiction under section 38 is, therefore, attracted. The High Court rightly ordered the rectification in the exercise of its summary powers under section 38. The jurisdiction created by section 38 is very beneficial and should be liberally exercised. We see no reason why the Court should deny the applicant relief under section 38. The directors of the appellant company on the most frivolous of objections have prevented the State of Orissa from becoming a member for the last 16 years. It is a matter of regret that justice has been obstructed so long. There is no merit in this appeal.

The appeal is dismissed with costs. The appellant company do forthwith carry out the order of rectification passed by the Courts below, in case the order has not been carried out yet.

*Appeal dismissed.*

K.G.S.

## THE SUPREME COURT OF INDIA. (Civil Appellate Jurisdiction.)

PRESENT :—K. N. WANCHOO, J. C. SHAH AND S. M. SIKRI, JJ.

War Profits Tax Commissioner, Madhya Pradesh

v.

M/s. Binodram Balchand of Ujjain

.. Appellant\*

.. Respondent.

*Gwalior War Profits Tax Ordinance, Samvat 2001, as amended by Ordinance Samvat 2002 and Samvat 2004, rule 3 of Schedule I, Explanation—War Profits-tax—Assessee, managing agents of company—Receipt of dividend income on the shares of the company—Business of the company, subject to assessability under the Tax Ordinance—Dividend—Exclusion from taxable income of the assessee under the explanation enacted subsequent to the Ordinance—Retrospective application.*

*Interpretation—Statute—Tax Ordinance—Explanation added by first amendment—Second amendment—Insertion of a comma between words in the explanation and enacting comma would be deemed to be always therefrom the date of Tax Ordinance—Intention to render the explanation also retrospective, clear.*

The assessee carrying on managing agency business, submitted a return for the period 1st July 1944 to 16th October, 1944, under the Gwalior War Profits Ordinance, Samvat 2001, that was enacted for imposing tax on excess profits arising out of certain businesses. The dividend income on the shares of a company of which the assessee was the managing agents was included in the taxable income of the assessee. The Supreme Court remanding an appeal preferred by the Department and arising out of the reference proceedings, held that the assessee was dealing in shares and the holdings were not purely in the nature of investments. The High Court, on further consideration, again found in favour of the assessee by holding that the dividend income accrued or arose from the profits of the company and as the Ordinance applied to the business carried on by the company, the dividends were excluded under the explanation to rule 3 (1) of Schedule I. The Department appealed.

20th April, 1966.

The *Explanation* was added to rule 3 by the Ordinance 2002. Ordinance 2004 (1947) was enacted to amend the *Explanation* by adding a comma after the words 'from a company carrying on a business' and before the words 'to the whole of which' and shall be always deemed to be therefrom the date from which the Ordinance of 2001 came into force.

Held that the *Explanation* applied to the computation of the profits of the chargeable accounting period 1st July 1944 to 16th October, 1944. Ordinance 2002 and Ordinance 2004 read together render clear the legislative intention to make the *Explanation* retrospective. Ordinance 2004 expressly assumes that the *Explanation* was in existence from the date when the Ordinance came into force and by deeming that the comma shall be deemed to be there from the date from which the Ordinance came into force it expressly assumes that the *Explanation* was also in force from that date. The dividends are thus to be excluded in the computation of the taxable income of the assessee.

Rule 3 (1) is general and deals with all investments mentioned in rule 3 (2). Rule 3 (2) deals with investments of a certain business, i.e. business which consists wholly or mainly in the dealing in or holding of investments. The language of the *Explanation* is quite clear and by the words in rule 3 (2) of the First Schedule to the Ordinance the following shall be added: what was really meant was to add the *Explanation* below rule 3 (2).

Appeal by Special Leave from the Judgment and Order, dated the 6th September, 1962 of the Madhya Pradesh High Court in Misc. Civil Case No. 108 of 1958.

*I. N. Shroff*, Advocate, for Appellant.

*S. T. Desai*, Senior Advocate (*S. N. Andley*, *Rameshwar Nath*, *P. L. Volra* and *Mahinder Narain*, Advocates of *M/s. Rajinder Narain & Co.*, with him), for Respondent.

The Judgment of the Court was delivered by

*Sikri, J.*—This appeal by Special Leave is directed against the judgment of the High Court of Madhya Pradesh in a reference made to it under section 46 of the Gwalior War Profits Tax Ordinance, Samvat 2001—hereinafter called the Ordinance. Three questions were referred to the High Court by the War Profits Tax Commissioner, but we are only concerned with question No. 1, which reads as follows:

'Whether the dividend income of Rs. 11,09,332 received from the Binod Mills was chargeable under the War Profits Tax?

When the reference was first heard by the High Court three contentions were raised by *M/s. Binodram Balchand of Ujjain*, respondents before us, hereinafter referred to as the assesseees. They were:

(1) The assesseees did not deal in shares and their holdings in the Binod Mills Limited were purely in the nature of investments having no connections with their business as defined in section 2 (5) read with rule 1 of Schedule I of the Gwalior War Profits Tax Ordinance. The business of the secretaries, treasurers and agents of the Binod Mills Limited which was carried on by them did not require any holding of the shares of the company and was not dependent on their investment in the said company.

(2) The dividend income accrued or arose from the profits of the Binod Mills Limited and as the Ordinance applied to the business carried on by the company, the dividends were excluded under the *Explanation* to rule 3 (1) of Schedule I.

(3) The dividend income should be considered as income of the full accounting period, i.e., from Diwali of 1943 to Diwali of 1944 and should be apportioned on that basis.

The High Court by its judgment, dated 19th April, 1957, accepted the first contention of the assesseees and accordingly answered the question in their favour. It did not deal with contentions Nos. 2 and 3. The Commissioner appealed to this Court and this Court by its judgment dated 20th December 1961, set aside the judgment of the High Court and answered the first contention in relation to question No. 1 against the assesseees and remanded the case to the High Court for the consideration of the other two contentions with reference to that question. The High Court on remand accepted the second contention of the assesseees and answered question No. 1, set out above, in favour of the assesseees. The Commissioner having obtained Special Leave, the appeal is now before us for disposal.

A few facts may be given in order to appreciate the point that has been argued before us. The assesseees were, at the relevant time, the Managing Agents of the

Binod Mills, Ltd., Ujjain, which was a private limited company carrying on the business of manufacturing and selling textile goods in 1944. The Ruler of the Gwalior State promulgated the Gwalior War Profits Tax Ordinance, Samvat 2001, for the purpose of imposing tax on excess profits arising out of certain businesses. The Ordinance came into force on 1st July, 1944, and applied originally to the accounting period falling within the period commencing on 1st July, 1944, and ending on 30th June, 1945. By virtue of a notification the period was extended to 30th June, 1946.

The assessee carried on the Managing Agency business during the aforesaid period in Gwalior State and being liable to be assessed to war profits submitted a return for the period commencing from 1st July, 1944, to 16th October, 1944. It appears that Rs. 11,09,332 was received by the assessee on 5th July, 1944, on account of dividend on shares of the Binod Mills for the year 1943. The assessee *inter alia* contended before the War Profits Tax Officer that this sum was not liable to be charged. The War Profits Tax Officer, however, by order dated 9th July, 1951, included this sum of Rs. 11,09,332 in the taxable income and his view was upheld in appeal by the Appellate Assistant Commissioner and the Commissioner. As stated above, the Commissioner, at the instance of the assessee referred three questions, including the one with which we are concerned, to the High Court.

It appears that before the High Court the learned Counsel for the Commissioner did not seriously dispute the contention of the assessee that the dividend income which the assessee had received was exempted by the *Explanation* to rule 3 of Schedule I of the Ordinance. The rule as it existed originally was as follows :

"3. (1) Income received from investments shall be included in the profits of a business liable to the War Profits Tax, unless it is proved to satisfaction of the War Profits Tax Officer that the investments have no connection whatever with the business.

(2) In the case of a business which consists wholly or mainly in the dealing in or handling of investments, income received from investments shall be deemed to be profits of that business, and in the case of a business, a specific part only of which consists in dealing in investments, the income received from investments held for the purposes of that part of the business shall be deemed to be profits of that part of the business."

By section 2 of the Gwalior War Profits Tax (Amendment) Ordinance, Samvat 2002—hereinafter referred to as Ordinance 2002, rule 3 of the First Schedule to the Ordinance was amended as follows :

"In rule 3 (2) of the First Schedule to Ordinance the following shall be added, namely :—

*Explanation.*—The income from investments to be included in the profits of the business under the provisions of this rule shall be computed exclusive of all income received by way of dividends or distribution of profits from a company carrying on a business to the whole of which the section of the Ordinance imposing the War Profits Tax applies."

This Ordinance was promulgated on 28th February, 1946. Another Ordinance called the Gwalior War Profits Tax (Amendment) Ordinance, Samvat 2004—hereinafter referred to as Ordinance 2004—was promulgated on 6th September, 1947. This Ordinance amended the *Explanation* to sub-rule (2) of rule 3 of Schedule I as follows :

"In the *Explanation* of sub-rule (2) of rule 3 of Schedule I of the Gwalior War Profits Tax Ordinance, Samvat 2001 a comma is added after the words 'from a company carrying on a business' and before the words 'to the whole of which' and shall be always deemed to be there from the date from which the said Ordinance came into force."

The High Court felt no difficulty in holding that the explanation applied, and that on its plain terms the dividend income which the assessee received from the profits of Binod Mills, Ltd. was not liable to be included in the taxable income. The High Court observed :

"The language of the explanation is very plain, and it means that if income is received by way of dividends or profits from a company carrying on a business, to the whole of which the section of the Ordinance imposing the War Profits Tax applies, then the income has to be excluded in the assessment to War Profits Tax of the assessee receiving that income. The object of the explanation is clearly to avoid double taxation. Here it is not disputed that the dividend income which the assessee received was from the profits of the Binod Mills, Limited and the Mills, were subject to the burden of War Profits Tax under the Ordinance. That being so, the explanation in terms applies to the case, and the assessee is entitled to claim that the dividend income of Rs. 11,09,332 received from Binod



Mills could not be included in the computation of its profits for the purposes of War Profits Tax and was consequently not chargeable under the War Profits Tax Ordinance. Learned Advocate-General appearing for the State did not dispute this position.

Mr Shroff, the learned Counsel for the Commissioner contends, first, that the *Explanation* was not in existence at the relevant time, and, therefore, cannot be taken into consideration, secondly, that the *Explanation* is an *Explanation* to rule 3 (2) and not to rule 3 (1) and, therefore, cannot be used to explain rule 3 (1). Mr Shroff complains that the High Court was wrong in thinking that the *Explanation* formed part of Ordinance 2001, as it was originally promulgated. The High Court seems to have been under this impression because in the order refusing leave to appeal to this Court the High Court observed

\* There was no omission at all on our part to consider the question whether the *Explanation* was prospective or not. Indeed this question was never raised by the learned Advocate-General, appearing for the Department and it was rightly not raised as the *Explanation* was not added subsequent to the promulgation of the Ordinance and the very basis of the assessment of the income of the assessee was that rule 3 of Schedule I of the Ordinance together with the *Explanation* applied to the income received by the assessee during the period from 1st July, 1944 to 16th October, 1944."

It seems that Ordinance 2002 and Ordinance 2004 were not placed before the High Court and for this reason it assumed that the *Explanation* was not added subsequent to the promulgation of the Ordinance.

But even if it was added subsequently, in our opinion, the *Explanation* applies to the computation of the profits of the chargeable accounting period 1st July, 1944 to 16th October, 1944. If we read Ordinance 2002 and Ordinance 2004 together the legislative intention to make the *Explanation* retrospective becomes clear. Apart from Ordinance 2004, it would have been very arguable that the *Explanation* inserted by Ordinance 2002 was retrospective because it dealt with the computation of profits and would apply to all computation of profits and would apply to all computation of profits made by the Taxing Authorities after 28th February, 1946. But we need not go into this question because Ordinance 2004 expressly assumes that the *Explanation* was in existence from the date when the Ordinance came into force and no other meaning can be given to section 2 of Ordinance 2004 because by deeming that the comma shall be deemed to be there from the date from which the Ordinance came into force it expressly assumes that the *Explanation* was also in force from that date. Accordingly we are not inclined to accept the first contention of Mr Shroff and we must hold that the *Explanation* applies to the computation of profits of the chargeable accounting period 1st July, 1944 to 16th October, 1944.

Regarding the second contention, Mr Shroff says that Ordinance 2002 expressly provides that the *Explanation* shall be added in rule 3 (2) of the First Schedule to the Ordinance. He further says that this *Explanation* is referred in Ordinance 2004 as "*Explanation* of sub-rule (2) of rule 3 of Schedule I". There is no doubt that Ordinance 2002 did purport to add this *Explanation* to rule 3 (2) but it seems to us that if we look at the language of the *Explanation* it was meant to be an *Explanation* not only to rule 3 (2) but to rule 3 (1) also. First, the words "the income from investments to be included in the profits of the business under the provisions of this rule" are comprehensive and include income from investments both under rule 3 (1) and rule 3 (2). Secondly, there is no reason why any distinction should have been made between investments mentioned in rule 3 (1) and investments mentioned in rule 3 (2). Rule 3 (1) is general and deals with all investments from profits of all businesses and would include investments mentioned in rule 3 (2). Rule 3 (2) deals with investments of a certain business, i.e., business which consists wholly or mainly in the dealing in or holding of investments. We have not been able to appreciate why, if Mr Shroff is right, was it necessary to distinguish between income from investments mentioned in rule 3 (1) and income from investments mentioned in rule 3 (2). At any rate, the language of the *Explanation* is quite clear and it seems to us that by the words "in rule 3 (2) of the First Schedule to the Ordinance, the following shall be added" what was really meant was to add the *Explanation* below rule 3 (2).

In the result we agree with the High Court that the answer to the question referred should be in the negative. The appeal accordingly fails and is dismissed with costs.

Bombay Land Requisition Act (XXXIII of 1948), sections 4 (3) and 6—Bombay Rents, Hotels and Lodging Houses Act (LVII of 1947), sections 13 (1) (g) and 17—Person evicted in execution of a decree for ejectment under the Act of 1947—Requisition of the same premises under the Act of 1948—Allotment to the evicted Person—Legality .. .. .	379
Bombay Prohibition Act (XXV of 1949), as amended by Bombay Act (XII of 1959), sections 24-A (2), 66 (1) (b), 66 (2) and 85 (1) (1)—Consuming liquor contained in a medicinal preparation—When not punishable under section 66 (1) (b)—Burden of proof .. .. .	324
Bombay Sales Tax Act (V of 1916), sections 13 and 20 (Bombay Sales Tax Act (XXIV of 1952, sections 19 and 29)—Advance tax paid by a registered dealer—Provision void under Article 286 (1) (a) of the Constitution (1950)—Discovered as void in 1952—Suit for refund of tax paid—Mistake of law—If barred—Limitation Act (IX of 1903), Article 96 .. .. .	359
Bombay Tenancy and Agricultural Lands Act (LVII of 1948), sections 14 (1) and 29 (2)—Default in payment of rent—Notice of termination of tenancy—Application for an order for possession—Starting point of limitation of two years .. .. .	346
Civil Procedure Code (V of 1908), section 60 (1) (g)—Political pension—If includes privy-purse given to ex-Ruler .. .. .	285
Civil Procedure Code (V of 1908), sections 86 (1) and 87-B—Consent of Central Government—If necessary for proceedings against ex-Ruler under section 14 of the Arbitration Act (X of 1940) .. .. .	285
Civil Procedure Code (V of 1908), section 99 and Order 20, rule 12—Suit by plaintiff—Decree in favour of one of the defendants and against the other defendants—Interference by appellate Court on ground that a decree cannot be passed in favour of a defendant who has not asked for transposition as plaintiff—Bar of section 99—Applicability—Award of mesne profits to a person who has not asked for the same—Legality .. .. .	310
Companies Act (VII of 1913), section 38 and Regulations in Table 'A', First Schedule—Rectification of share register—Transmission by operation of law—'Transfer' and 'Transmission', distinction—Discretion of directors to refuse recognition of transfer—Powers of Court to control .. .. .	393
Constitution of India (1950), Article 5—Iranian National registered under Foreigners Rules, 1939, residing in India for over 5 years before 21st November, 1949, under residential permits renewed from time to time under Foreigners Order, 1946—If can claim to be citizen of India under Article 5 of the basis that he had his domicile in the territory of India .. .. .	334
Constitution of India (1950), Article 133—Appeal to Supreme Court—New Case cannot be set up for the first time .. .. .	310
Constitution of India (1950), Article 133—Appeal to Supreme Court—New plea—Cannot be raised when there is utter lack of factual basis to sustain the plea .. .. .	324
Constitution of India (1950), Article 226—Discretion of High Court to issue writs under .. .. .	270
Contract Act (IX of 1872), section 126—Execution of a joint-promissory note along with two other documents on the same day as security for an overdraft account—Status of one of the signatories to the promissory note if that of co-surety or co-obligant—Determination of—All the documents being parts of same transaction should be read together—Applicability of section 92 of Evidence Act (I of 1872) .. .. .	317
Custom—Punjab—Jats in Amritsar District—Customary adoption—Adopted son when entitled to collateral succession .. .. .	363
Deed—Several deeds forming part of one transaction executed on the same day—Construction .. .. .	317
Evidence Act (I of 1872), section 115—Estoppel by representation—No estoppel against person who knows the true state of facts .. .. .	310
Family settlement—Requisites for validity—Registration when essential—Registration Act (XVI of 1908), section 17—Applicability .. .. .	290
Guardians and Wards Act (VIII of 1890), sections 25, 47 and 48—Petition under section 25—Order thereon appealable under section 47—Appellate order, finality of—Rajasthan Ordinance (XV of 1949), clause 18 .. .. .	265
Gwalior War Profits Tax Ordinance, Samvat 2001, as amended by Ordinance Samvat 2002, Samvat 2004, rule 3 of Schedule I, Explanation—War Profits-tax—Assessee, managing agents of company—Receipt of dividend income on the shares of the company—Business of the company, subject to assessability under the Tax Ordinance—Dividend—Exclusion from taxable income of the assessee under the Explanation enacted subsequent to the Ordinance—Retrospective application .. .. .	397

(Continued in cover page 2)

# TABLE OF CASES IN THIS PART

## SUPREME COURT OF INDIA

Bhakar v State of U P  
 Bahubhar Nath Kahl v State of Uttar Pradesh  
 Chaitanatha Nayal v Central Bank of India Ltd  
 Gulab Bai v Purnya  
 Indian Chemical Products Ltd v State of Orissa  
 Kalyan Stores v State of Orissa  
 Kedar Singh v Dewan Singh  
 Lala Shri Bhagwan v Shri Ram Chand  
 Maddanappa v Chandramma  
 Malludora v Seharatnam  
 Md Reza Debsan v State of Bombay  
 Mongba Hariram v State of Maharashtra  
 Navaab Usmanul Khan v Sagar Mal  
 Punjab Sikh Regular Motor Service v R T Authority  
 R K Shankar Jagtap v S B Sakharan Jedhe  
 Shankaranarayana v State of Mysore  
 State of Bombay v Jagmolandas  
 Tek Bahadur Bhujl v Deb Singh Bhujl  
 Union of Mysore v Gopala Gowda  
 Venkatesh Narahar Katti v H K Mulla  
 Venkatesh Rao v Government of A.P.  
 Vjay Singh v State of Maharashtra  
 War Profits tax Contr v M/s. B Balchand

## INDEX OF REPORTS

Administration of Evacuee Property Act (XXXI of 1950) (as amended by Act I of 1950 sections 27 and 58 (3))—Declaration by Deputy Commissioner Lucknow as evacuee property under Ordinance XII of 1949—Acquisition of that property by Central Government under Act XLIV of 1954—Sale by auction and purchase by R.G.K. in 1957—Revision petition in 1961 by U.P. State to Custodian-General against the order declaring the property as evacuee property in 1949—Maintainability—Exercise of revisional powers in his discretion—Jurisdiction of Supreme Court to interfere in appeal—Additional evidence of copies of evidence—Inconsistent with judicial procedure and Rules of natural justice—D placed Persons (Compensation and Rehabilitation) Act (XLIV of 1954) section 12  
 Andhra Pradesh Panchayat Samiths and Zilla Panchayats Act (XXXV of 1959) sections 62 and 72—Powers of Government under—Orders under not legally passed—Powers of High Court to issue writ quashing the latter illegal order  
 Arbitration Act (V of 1940)—Award stating that the existing documents relating to debts obtained on lands would remain as before and remain as securities till repayment—If requires registration under—Registration Act (XVI of 1908) section 17  
 Bharat and Orissa Excise Act (II of 1915) section 27—No fixation under dated 31st March 1961—Levy of duty (commencing on foreign liquor imported from other States)—No manufacture of foreign liquor in the State—Validity—Constitution of India (1950) Articles 301, 304, 305, 366 (10) and 372

362

(Continued in cover page 3)